81-1615

No.

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In The

Supreme Court of the United States

October Term, 1981

IN THE MATTER OF JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR.,

Appellant,

vs.

JOHNS-MANVILLE CORPORATION, et al.,

Appellees.

On Appeal from the
New York Court of Appeals

JURISDICTIONAL STATEMENT

Lipsitz, Green, Fahringer,
Roll, Schuller & James
By: Frank S. Kedzielawa, Esq.
Attorney for Appellant
Office and Post Office Address
One Niagara Square
Buffalo, New York 14202
Telephone: (716) 849-1333

DATED: February 26, 1982

QUESTION PRESENTED

If New York, and some of the other states, construe their statute of limitations, when applied to latent and inherently unknowable injuries like appellant's asbestos disease, to run from the date of inhalation or exposure and not the date when any possible harm would be discoverable, have they satisfied the minimum due process standards established by this Court that state statutes of limitation: (1) provide a plaintiff with an adequate, bona fide opportunity to commence the action, and (2) are not inconsistent with the common law purposes behind statutes of repose?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW*

The opinion of the New York Court of Appeals, which appears in the Appendix hereto, see *infra* at p. A-1, is reported at 54 N.Y.2d 1008, N.Y.S.2d , N.E. 2d (1981). An

*The full names of all of the appellees are as follows:

Johns-Manville Corporation,
Eagle Picher Industries, Inc.,
Phillip Carey Industries, Inc.,
Owens-Corning Fiberglass Corporation,
Armstrong Cork Company,
Fibreboard Paper Products Corp.,
Combustion Engineering, Inc.,
Pittsburg Corning Corp.,
Unarco Industries, Inc.,
Armstrong Contracting and Supply Corp.,
Standard Asbestos Manufacturing and Insulating Company,
Keene Insulation Company,
Rockwell Manufacturing Company, and
GAF Corporation.

amendment to its remittitur noting its adjudication of the constitutional issues raised below appears in the Appendix, *infra* at p. A-19. This does not yet appear in the official reporter, or in unofficial reporters.

The decision of the intermediate appellate court appears at 78 A.D.2d 577, 432 N.Y.S.2d 422 (4th Dept. 1980). The decision of the Special Term (i.e., motion term) of the Supreme Court, Erie County, New York, appears at 94 Misc.2d 327, 404 N.Y.S.2d 814 (1978). It is reported *sub nom McKee* v. *Johns-Manville Corp.*

JURISDICTION

This suit is one in which the highest court of the State of New York sustained the constitutionality of a state statute, N.Y. CPLR 214(5), as interpreted and applied to this action. The jurisdiction of this court is therefore invoked under 28 U.S.C. §1257(2).

The judgment of the New York Court of Appeals dismissing appellant's complaint was entered on October 29, 1981. *See infra* at p. A-17. A motion to amend the remittitur was made by appellant and granted on December 22, 1981. *See infra* at p. A-19.

A notice of appeal to this court was timely filed in the New York Court of Appeals and with the clerk of the Supreme Court, Erie County, the court then possessed of the record. The notice of appeal was filed on December 10, 1981.

This appeal is being docketed on February 26, 1982, pursuant to an order extending the time within which to docket this appeal granted by the Hon. Justice Thurgood Marshall dated December 28, 1981. See *infra* at p. A-22.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, §1, of the United States Constitution:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

New York CPLR 214(5):

> The following actions must be commenced within three (3) years:
>
> (5) An action to recover damages for a personal injury except as provided in §§214-(b) and 215.

STATEMENT OF THE CASE

(i) *Nature of the Case*

This is an action in negligence and strict products liability against the major manufacturers, suppliers and distributors of asbestos-containing insulation products in the United States. The complaint alleges that each defendant knew for many years of the hazards of inhalation of asbestos dust and particles; that asbestos workers like the late James McKee had no knowledge or appreciation of the severe hazards of asbestos exposure; that rather than inform McKee and his fellow workers of these known dangers, the Johns-Manville Corporation and its co-defendants chose to remain silent. Their silence permitted McKee, like many others, to use their products and inhale asbestos particles in ignorance of the accompanying health risks and without adequate preventive measures against these known and suspected health hazards. The proximate result of this failure to warn was his total and permanent disability from asbestosis and his eventual death from mesothelioma. The

action is now brought by his daughter, Jeanne Steinhardt, as executrix of his estate.

The issue of industry awareness has been litigated and reviewed in reported federal and state decisions. It has been the subject of congressional investigations. The most succinct of these is *Borel* v. *Fiberboard Paper Products*, 493 F.2d 1076, 1083-86, nn.3-16 and accompanying text (5th Cir. 1973); also see, *Hearings on Asbestos Related Occupational Diseases before a Subcommittee of the House Committee on Education and Labor*, 95th Cong. 2d Sess. 1-4, 52-128.

Not everyone who inhales asbestos dust subsequently develops an asbestos disease. If one of these diseases (asbestosis or mesothelioma)[1] does develop, however, "it does not manifest itself until 10 to 25 or more years after initial exposure . . . . By the time the disease is diagnosable a considerable period of time has elapsed since the date of the injurious exposure." *Borel*, 493 F.2d at 1083.

James McKee had been employed in asbestos insulation work from 1939 to 1972. His last occupational exposure to asbestos was in 1970. He retired in 1972 because of respiratory ailments. No diagnosis of asbestos disease was made, nor was possible, until March of 1973 when a positive biopsy was obtained. In 1978 he died of mesothelioma.

From his first hospitalization in 1968 until the diagnosis of asbestosis was made in 1973, his physician could only report —

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[1]The disease of asbestosis is a scarring of the lung tissue, a fibrotic induration where the lung loses its flexibility or pliability — its ability to expand or contract. It hardens and becomes wood-like.

The disease of mesothelioma is medically distinguished from lung cancer. It is a tumerous carcinoma (malignancy) of either the membrane encasing the lung (pleura) or of a similar delicate membrane lining the abdominal cavity (peritoneum). Generally its latency period is 30 years and is nearly always fatal 8-14 months after the cancer first appears.

"I found he had a pulmonary infection . . . he had nothing different from my average patient, who comes in with a pulmonary infection in the City of Buffalo, where there is a lot of pollution."[2] Lung biopsies were entirely negative until the 1973 diagnosis.

This action was commenced in the New York State Supreme Court within three years of that diagnosis. The appellees engaged in pre-trial discovery procedures. Before appellant initiated his discovery activities, appellees moved to dismiss the action as barred by New York's three-year statute of limitations, CPLR 214(5).

New York does not embrace a discovery rule beyond the medical malpractice foreign object context. *See* 7B *McKinney's New York CPLR* 214-a. Negligence and strict products liability actions accrue when the injury occurs and not when it is first discoverable. In this context, appellees urged, the injury occurs at the time of inhalation or exposure. *Schmidt* v. *Merchant's Despatch Transportation Co.*, 270 N.Y. 287, 200 N.E. 824 (1936); *Schwartz* v. *Hayden Chemical Corp.*, 12 N.Y.2d 212, 237 N.Y.S.2d 714, 188 N.E.2d 142, *rem. amended*, 12 N.Y.2d 1073, 239 N.Y.S.2d 896, *cert. denied* 374 U.S. 803 (1963); *Thornton* v. *Roosevelt Hospital*, 47 N.Y.2d 780, 417 N.Y.S.2d 920, 391 N.E.2d 1002 (1979).

In response appellant argued that this interpretation of CPLR 214(5) is an unconstitutional denial of due process of the law in its disregard of long established precedents by this Court which set forth minimum standards of due process fairness applicable to all state statutes of limitations and in the more specific context of latent diseases.

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[2]Examination Before Trial of P. Longstreth, M.D., at p. 412 of the record before the New York Court of Appeals.

(ii) ***How the Federal Question was Raised and Adjudicated Below.***

Appellees moved to dismiss the negligence and products liability actions as barred by the applicable state statute of limitations, New York CPLR 214(5). The constitutional issue was briefed and orally argued before a motion term of the Supreme Court, Erie County. The issue was also presented, indirectly, in appellant's counsel's affidavit, paragraph 22, submitted in opposition to that motion.

The court indirectly ruled upon the constitutional claim in barring the negligence cause of action. In so ruling it relied in part upon the authority of *Schwartz* v. *Hayden Chemical Corp.*, 12 N.Y.2d 212, 237 N.Y.S.2d 714. New York Court of Appeals Chief Judge Desmond and Associate Judge Fuld had dissented in *Schwartz* upon the constitutional issue and cited this Court's decision in *Urie* v. *Thompson*, 337 U.S. 163 (1949), upon which appellant heavily relied.

The court denied appellees' motion as to the products liability action; thus there was no adjudication of the constitutional claim as to that cause of action. *See infra* at p. A-9 to A-16.

The same issue was briefed and argued orally before the Appellate Division of the Supreme Court. In a *per curiam* decision, the Appellate Division granted appellees' motions to bar the products liability action, thus rejecting appellant's constitutional claim against barring that cause of action. For support the Appellate Division also drew upon, in part, *Schwartz* v. *Hayden Chemical Corp.* *See infra* at p. A-7.

When the appeal was brought before the New York Court of Appeals, appellant reiterated her constitutional claims during oral argument and in her brief. In choosing to leave any change in CPLR 214(5) to the state legislature, the majority opinion made no specific reference to this claim, but merely stated — "We have considered plaintiff's other contentions and find them to be without merit." *See infra* at p. A-3.

Associate Judge Fuchsberg, however, wrote in dissent that the present application and interpretation of §214(5) is unconstitutional, citing the dissent in *Schwartz* that, " 'it would be unreasonable and perhaps unconstitutional to hold that time to sue expired before it was possible for plaintiff to learn of the wrong.' " *See infra* at p.A-5. And for further support he, too, drew upon this court's reasoning in *Urie* v. *Thompson*, 337 U.S. at 170, that any such interpretation given to a statute of limitations, as has been done here, cannot be reconciled with the traditional purposes of statutes of limitation.

And in granting appellant's subsequent motion to amend the remittitur, the New York Court of Appeals noted, "there was presented and necessarily passed upon a question under the constitution of the United States, ..." *See infra* at p.A-19.

THE QUESTION IS SUBSTANTIAL

The question presented is substantial because the interpretation given §214(5) by the New York Court of Appeals is in bold disregard of precedent after precedent by this Court establishing the minimum due process standards for all state statute of limitations and when applied in identical factual circumstances as presented by this appeal.

The question presented is substantial, then, first of all because it offers to this Court a real and direct conflict with an unbroken line of precedent in this Court.

Its substantial nature is further reflected in the noteworthy character of the question. Preeminent procedural authorities in New York have focused significant attention on this constitutional question. *See* 7B *McKinney's New York CPLR* §214, C214:6 at p.437, *Practice Commentary* by J. McLaughlin; Note, *Asbestos Litigation* 7 Fordham Urban L.J. 55, 77-83 (1978); Kelner, *Asbestos Litigation: An Update*, Vol.182 N.Y.L.J. No. 51, p.1, col.1 (Sept. 12, 1979); Note, 45 Albany L.Rev. 717 (1981).

And the unconstitutional character of such interpretations of statutes of limitations has captured the attention of bench and bar nationwide.[3] Motley, *The Causal Relation Discovery Rule* (constitutional attacks on statute of limitations), 1 J. of Products Liability 221, 229 (1977); Note, *Developments in the Law of Statutes of Limitation*, 63 Harv.L. Rev. 1177, 1200, 1203-07 (1963); Bruck, *The Armies of Asbestos*, The American Lawyer, November, 1979 at p.19; Birnbaum, *"First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases*, 13 Forum 279, 282 (1977).

But the question presented is substantial not only in terms of content, however, but also in terms of the number of citizens in the State of New York, and elsewhere, who must suffer similar constitutional deprivations. There are thousands of asbestos insulation workers throughout New York State and not one of them has *ever* been able to timely file suit. And in view of the latent nature of the injury, thousands of New York asbestos workers exposed in the 1940's-60's will attempt suit in future years. Section 214(5) will not permit one of them inside the courthouse door. Their due process rights to have at least a reasonable, meaningful time within which to pursue their common law negligence actions are being wholly frustrated by the lower court's decision to sustain the constitutionality of §214(5) as presently interpreted and applied, notwithstanding the constitutional perimeters for state statutes of limitations previously established by this Court, discussed *infra*.

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[3]The issue of industry awareness and the hazards of asbestos exposure, and financial compensation for its victims, are of real and present concern to the public and the Congress. *See, Hearings on Asbestos Related Occupational Diseases Before A Subcommittee of the House Committee on Education and Labor*, 95th Cong. 2d Sess. 1-4, 52-128; *Library of Congress Congressional Research Services*, 96th Cong. 2d Sess., Report of Six Case Studies of Compensation for Toxic Substance Pollution (Comm. Print 1980); *The Magic Mineral*, New Yorker Magazine, October 12, 1968 at p. 117.

Full review and consideration by this court would resolve the issue not only for those thousands of New York citizens, but indeed for hundreds of thousands of asbestos workers in those few other states who,[4] like New York, have failed to satisfy their constitutional responsibility to fashion a statute of limitations rule that affords a reasonably diligent plaintiff realistic access to the courthouse door.

The due process deprivation here is twofold. First, the application given §214(5) in this factual context is at odds with the very *raison d'etre* for statutes of limitations, as this Court concluded under identical circumstances in *Urie* v. *Thompson*, 337 U.S. 163. If a rule is at odds with its very purpose, it is irrational and therefore unconstitutional.

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[4]*See e.g.*, *Neubauer* v. *Owens-Corning Fiberglass*, 504 F.Supp. 1210 (E.D. Wis. 1981) applying Wisconsin law; also see *Basshom* v. *Owens-Corning Fiberglass*, 327 F.Supp. 1007 (N.M. 1971). Nearly every other state, however, has satisfied its constitutional duty in framing rational and reasonable statutes of limitation for inherently unknowable injuries. *See Tyson* v. *Johns-Manville Corp*, 399 So.2d 263 (Ala Sup. C[illegible] 1981); *Velasquez* v. *Fiberboard Paper Products*, 97 Cal. App.3d 881, [illegible] Cal. Rptr. 113 (1st Dist. 1979); *Ricciuti* v. *Voltarc Tubes, Inc.*, 277 F.2[illegible]9 (2d Cir. 1960) (Conn.); *Layton* v. *Allen*, 246 A.2d 794 (Del. Super. Ct. 1968); *Fearson* v. *Johns-Manville Corp.*, 525 F.Supp. 671 (D.C. D.C. 1981); *Nolan* v. *Johns-Manville Corp.*, 85 Ill.2d 161, 421 N.E.2d 864 (1981); *Essex Wire Corp.* v. *M.H. Hilt Co.*, 263 F.2d 599 (7th Cir. 1959) (Ind.); Kan. Stat. Ann. §60-513 (1964); *Louisville Trust Co.* v. *Johns-Manville Corp.*, 580 S.W.2d 497 (1979); *R.J. Reynolds Tobacco Co.* v. *Hudson*, 314 F.2d 776 (5th Cir. 1963) (La.); *Marig* v. *Johns-Manville Corp.*, 284 Md. 70, 394 A.2d 299 (1978); *Karjala* v. *Johns-Mansville Corp.*, 523 F.2d 155 (8th Cir. 1975); *West* v. *Atlas Chemical Industries, Inc.*, 264 F.Supp. 697 (E.D. Mo. 1966); *Raymond* v. *Eli Lily Co.*, 412 F.Supp. 1392 (N.H. 1976), *aff'd* 556 F.2d 628 (2d Cir. 1976); *Williams* v. *Borden, Inc.*, 637 F.2d 731 (10th Cir. 1980) (Okl.); *Coyne* v. *Porter-Hayden Co.*, 428 A.2d 208 (Pa. Super. Ct. 1981); *Buckner* v. *GAF*, 495 F.Supp. 351 (E.D. Tenn. 1979); *Strickland* v. *Johns-Manville Corp.*, 461 F.Supp. 215 (C.S.D. Texas 1978); *Locke* v. *Johns-Manville Corp.*, 275 S.E.2d 900 (Va. Sup. Ct. 1981); *c.f. I.N.A.* v. *Forty-Eight Insulations, Inc.*, 451 F.Supp. 1230 (E.D. Mich. 1978).

Secondly, as this Court has repeatedly held, state statutes of limitation must provide the plaintiff with an adequate, *bona fide* opportunity to bring suit.

> It may be properly conceded that statutes of limitation *must* proceed on the idea that the party has full opportunity afforded him to try his right in the courts.

Wilson v. *Iseminger*, 185 U.S. 55, 62 (1901) (emphasis supplied). And again in *Canadian No. Ry. Co.* v. *Eggen*, 252 U.S. 553, 562 (1920) (emphasis added) the same principle was sounded:

> A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them *for a length of time reasonably sufficient to enable an ordinarily diligent man to initiate proceedings for their protection.*

The Court, "has often decided that statutes of limitation affecting existing rights are not unconstitutional, *if a reasonable time is given for the enforcement of the action before the bar takes effect.*" *Terry* v. *Anderson*, 95 U.S. 628, 633 (1877). Reasonableness is determined in view of the subject matter. *U.S.* v. *Morena*, 245 U.S. 392, 397 (1918). As Mr. Justice Harlan wrote in *Wheeler* v. *Jackson*, 137 U.S. 245, 255 (1890) (emphasis supplied):

> It is the settled doctrine of this Court that the legislature may describe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, *provided, in each case, a reasonable time, taking all the circumstances into consideration, be given . . . .*

Cf. Atchafalaya Land Company v. *F.B. Williams Cypress, Co.*, 258 U.S. 190 (1922).

All of the circumstances surrounding latent diseases like asbestosis and silicosis were taken into account by this Court in

Urie v. *Thompson*, 337 U.S. 163. The Court made it quite clear that these due process standards are not satisfied by a date of exposure/inhalation rule; that the date of inhalation or exposure rule in actions to recover for latent diseases does not afford the plaintiff, "a length of time reasonably sufficient to enable an ordinarily diligent man to initiate (his) proceedings . . . ." *Canadian No. Ry. Co.* v. *Eggen*, 252 U.S. at 562.

To embrace appellees' reasoning, this Court ruled, "would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this rule Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability." *Urie*, 337 U.S. at 169.

And although the Court in *Urie* was construing a statute of limitations under the Federal Employers' Liability Act, its decision rested not upon anything peculiar to that legislation, but upon the unfair consequences that would attach, "to blameless ignorance." *Id.*, at 170. Such consequences would be at odds with the traditional common law purposes behind statutes of repose:

> Nor do we think these consequences could be reconciled with the *traditional purposes of statutes of limitation*, which conventionally require the assertion of claims within a specified period of time after *notice* of the invasion of legal rights.

Id. (emphasis added).

Thus in *Urie* the Court borrowed language from a California Workers Compensation decision which, "seems to us applicable in every relevant particular . . . ." *Id.*

In the context of latent diseases, this plaintiff's injury is, " 'the product of a period of time rather than a point in time,' "

and that, " 'no specific date of contact with the substance can be charged with being the date of injury.' " *Id.*

The obvious result, then, for any statute of limitations, whether for common law actions or statutory programs which seek recovery for latent and inherently unknowable injuries is that, "the affected (plaintiff) can be held to be 'injured' only when the accumulated effects of the deleterious substances manifest themselves." *Urie*, 337 U.S. at 170 quoting *Associated Indemnity Corp.* v. *Industrial Accident Comm.*, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076.[5]

Early in this court's history it recognized the need for its intervention into the field of state statute of limitations where the statutory time provided, the manner of its application, or the definition of when such limitations begin, are so unreasonable as to amount to a denial of due process premised on essential notions of fairness.

> The time and manner of their operation, the exceptions to them, and the acts from which the time limit shall begin to run will generally depend on the sound discretion of the legislature, ... Cases may occur

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[5]There is no danger that the plaintiff will sleep on his rights, for he has no notice that his rights have been invaded until the latent disease first manifests itself. And as court after court has noted in adjudicating claims against the asbestos industry, there is no significant danger here that time has faded memories, evidence has been lost or witnesses have disappeared, as cautioned by the Court in *Order of R.R. Telegraphers* v. *R.E.A.*, 321 U.S. 342, 349 (1944). *See e.g.*, *Harig* v. *Johns-Manville Corp.*, 284 Md. 70, 394 A.2d 299, 302 (1978). The documents produced by discovery in nationwide litigation against this industry and by congressional investigations have provided adequate insurance against any such unfairness to these defendants. *See Hearings*, n.3, *supra*.

This appeal does not present the case where a plaintiff is ignorant of his legal right to commence an action, *see, e.g.*, *U.S.* v. *Kubrick*, 444 U.S. 111 (1979), but is, instead, the case of a plaintiff whose injury is unknowable until manifestation and where, "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *Id.*, at 122.

> where the provisions of a law in those subjects may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court; . . . .

Jackson v. *Lamphire*, 28 U.S. (3 Pet.) 280, 290 (1830).

Therefore, plenary review should be given this direct defiance of Supreme Court precedent. New York's CPLR 214(5), as applied in the context of inherently unknowable injuries, must be realigned into conformity with constitutional precedent. It is important not only to this appellant, but to thousands like him accross the State of New York and, indeed, to many asbestos workers in other states which also have failed to meet their constitutional responsibilities. *See* n.4, *supra*.

Diversity among the states there must always be, especially in an area of traditional state concerns; but when a number of our states fail to accord its citizens their due process rights which have been firmly established by this Court in the form of general guidelines for fashioning rules for statutes of repose, there is then presented a serious and substantial issue soluble only by this Court.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Lipsitz, Green, Fahringer,
Roll, Schuller & James
By: Frank S. Kedzielawa, Esq.
Attorney for Appellant
Office and Post Office Address
One Niagara Square
Buffalo, New York 14202
Telephone: (716) 849-1333

DATED: February 26, 1982

DECISION OF NEW YORK STATE COURT OF APPEALS

STATE OF NEW YORK COURT OF APPEALS

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4 No. 434

In the Matter of Jeanne Steinhardt, as Executrix for James McKee, Jr.,

Appellant,

v.

Johns-Manville Corporation, *et al.*,

Respondents.

1 No. 435

Stanley Rosenberg &ano.,

Appellants,

v.

Johns-Manville Sales Corporation, &c., *et al.*,

Respondents.

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and 5 other actions:
Brenner v. Johns-Manville et al.
Cohen v. Johns-Manville et al.
Failla v. Johns-Manville et al.
Ferrarese v. Johns-Manville et al.
Weinberg v. Johns-Manville et al.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

(434) Frank S. Kedzielawa, Carl A. Green, & James W. Kirkpatrick, Buffalo, for appellant.

Alexander C. Cordes & Paul F. Jones, Buffalo, for respondents GAF et al.

Lawrence T. D'Aloise, Jr., White Plains, & Daniel T. Roach, Buffalo, for respondent Johns-Manville.

Thomas F. Segalla, Buffalo, for respondent Fibreboard Paper.

(435) Norman J. Landau, NY City, for appellants.

Lawrence T. D'Aloise, Jr., White Plains, for respondents Johns-Manville et al.

Franklin N. Meyer, NYC, for respondents Raybestos et al.

Michael Majewski & Joseph D. Ahearn, NYC, for respondents Southern Asbestos & H.K. Porter Co.

James J. Lysaght, Mineola, for respondent Colt Industries.

MEMORANDUM:

The orders of the Appellate Division should be affirmed, with costs.

Plaintiffs in these actions, asserting injuries caused by the inhalation of asbestos particles, each commenced his action more than four years after their or their decedents' last employment-related exposure to asbestos. In *Schmidt* v. *Merchants Despatch Trans Co* (270 NY 287), where the plaintiff alleged that the inhalation of dust while in the defendant's employ caused him to contract the disease known as pneumoconiosis, this Court held that the statutory period of limitations began to run when the plaintiff inhaled the foreign substance. This principal was later reaffirmed in *Schwartz* v *Heyden Newport Chemical Corp* (12 NY2d 212; cert den 374 US 808), involving a compound inserted into the plaintiffs' sinuses for the purpose of making them more perceptible in x-ray examination. Accordingly, if this rule is still controlling, each of the causes of action brought by plaintiffs is barred by the statute of limitations. Plaintiffs now urge, however, that the statutes of limitations applicable to their cases should not run from the date of the last exposure to the invading substance, but rather from

the date on which the asbestos related disease was or could have been discovered. We are unable to adopt this proposed standard, and we reaffirm the principle announced in *Schmidt* and followed in *Schwartz*. Only recently, in *Thornton* v *Roosevelt Hospital* (47 NY2d 780), where it was alleged that a thorium dioxide substance manufactured by the defendant and injected into the deceased plaintiff resulted in the onset of cancer, we held "that the cause of action accrued at the time of invasion of decedent's body, and not at the time" the condition became apparent. There, we noted that further extension of the limited discovery provision contained within the CPLR (214-a) was a matter best reserved for the Legislature, and not for the courts.* We believe it to be inappropriate and injudicious to intrude into an area best suited for legislative scrutiny. We have considered plaintiffs' other contentions and find them to be without merit.

M/o Steinhardt v Johns-Manville Corp.
Case No: 434

Rosenberg v Johns-Manville Corp.
Case No: 435

FUCHSBERG, J. (dissenting):

The orders appealed from in these cases should be reversed and the motions for summary judgment denied.

Once again we are confronted with a determination that plaintiffs who, alleging tortious wrongdoing as a result of which they were injured, are held to have been barred by the statute of limitations before they learned or could have learned that they had sustained the injuries of which they complain.

Though to state this proposition would appear to be to refute it, the majority, under what it takes to be the restraint of three

*As the dissent recognizes, the Legislature has acted but has so far gone no further than "Agent Orange" cases.

cases, *Schmidt v Merchants Despatch Transp. Co.* (270 NY 287), *Schwartz v Heyden Newport Chemical Corp.* (12 NY2d 212) and, most recently, *Thornton v Roosevelt Hospital* (47 NY2d 770), a decision in which I filed a dissent, in effect upholds it.

In my view, the cases cited are too confusing and contradictory to support such a result. For example, in *Schmidt*, though the court held that dust which produced a disease of the lungs set off the running of the statute when it was ingested rather than when the injury came to the fore, the court, inexplicably, also proclaimed (p. 300) that "there can be no doubt that a cause of action accrues only when the forces wrongfully put in motion *produce injury*" (emphasis added). Further, in the relatively short time which has elapsed since *Thornton* was decided, the Legislature already has issued policy pronouncements that cut across the legal philosophy they bespoke.[1] In such circumstances, the vitality of judge-made law depends in no small measure upon a readiness to have the judiciary, and not the Legislature, as *Thornton* and the majority memorandum in this case suggest, make its own corrections.

The underlying principle is hornbook law. As Dean Prosser

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[1]In amending section 214 of the Civil Practice Law and Rules, which details the various statutes of limitations, the Legislature, at its last regular session, included the following statements in its formal legislative findings"

> "* * * It was never the intent of the legislature, in imposing limitations, to foreclose the citizens of this state from prosecuting legitimate claims, provided such claims are diligently and expeditiously pursued. An exception to the general period of limitation rule is required when the pathological effect of an injury occurs without perceptible trauma, and the victim is blamelessly ignorant of the cause of the injury" (L. 1981, ch 266).

True, in the compromising fashion of legislative bodies (see *O'Malley* v *Macejka*, 48 NY2d 530, 533-534), these declarations were made applicable to "agent orange" cases alone. But, as with other social catalysts, what it accelerated was a return in this area to the mainstream of legal thought.

put it, "the statute of limitations does not begin to run against a negligence action until some damage has occurred" (Prosser, Law of Torts [4th ed], p 144). Or, as was acknowledged with apparent reluctance in Schwartz, "since, then, the recognized damages in negligence cases are pain and suffering, lost earnings and, we suppose, damage to the structure of the body, it is questionable whether any cause of action exists before these things actually happen" (*Schwartz, supra*, at p 217).

In this Court, contrary rulings have troubled its Judges, and, ultimately, have been repudiated by the court as a whole. So, in *Schwartz* itself, a strong dissent by Chief Judge Desmond and Judge (later Chief) Judge Fuld left no room for misunderstanding when it warned that "it would be unreasonable and perhaps unconstitutional to hold that time to sue expired before it was possible for plaintiff to learn of the wrong" (*Schwartz, supra*, at p 219). And, the clarion clear comment that "it is unthinkable that a person should be time-barred from prosecuting a cause of action before he ever had one", first made by Judge (later Chief Judge) Breitel in dissent in *Mendel v Pittsburgh Plate Glass Co.* (25 NY2d 340, 346), was later to be adopted by the whole court in *Victorson v Bock Laundry* (37 NY2d 395, 401).

Guided by these beacons, I now turn to the opposing positions on which summary judgment turned. The defendants' needs no elaboration; it is simply that the actions arose when each of the plaintiffs breathed the asbestos-laden air, that is, at the time of exposure. If this contention is credited, of course, the wrongful conduct and ensuing damages for all practical purposes would have been simultaneous. But the plaintiffs do not agree; they insist that the scientific facts are at odds with this unified concept. Pointing to medical authority, they contend that, while the unwanted invasions of their lungs by environmental air which had been contaminated by asbestos dust are the wrongful acts to which they were subjected, the damages they sustained

were in the form of diseases which did not come about until much later. From this exposition, the diseases, asbestosis and mesothalioma, the latter a cancer of the mesothelial cells which surround the organs of the chest cavity, are said to be consequential, as distinguished from immediate, in their temporal character (see also *Urie v Thompson*, 337 US 163, 170 ["consequences of the exposure are the product of a period of time rather than a point of time"]).

The plaintiffs go on to assert that the properties of particles of asbestos are such that their inhalation will not necessarily result in the contraction of the disease; that, unlike chemical compounds, the particles do not break down into reactive elements when lodged in the body; that those who are exposed may never sustain any injury at all; that, even if a cancerous tumor later forms, it will not have begun to do so at the time of exposure; that, before such an event will occur, the asbestos may lay dormant for years; and that the future time when it may develop is unpredictable.

In this apposition, the statute of limitations question is not one presenting a choice, as the majority would have it, between the times of inhalations and the times of discovery of the subsequent disease. Were that so, absent a discovery rule, the defendants' motions would indeed have had to have been granted. But, since the issue of fact fleshed out by the motions instead left it a case of dates of inhalation versus dates when the damaging disease came into existence, the question was one for triers of fact.

It follows that the orders of the Appellate Division must be reversed and the cases remitted for trial on the merits.

* * * * * *

Order affirmed, with costs, in a memorandum. All concur, Meyer, J., on constraint of *Thornton* v. *Roosevelt Hosp.* (47 NY2d 780); except Fuchsberg, J., who dissents and votes to reverse in an opinion.

Decided October 29, 1981

DECISION OF APPELLATE DIVISION OF STATE OF NEW YORK

DECISION OF APPELLATE DIVISION, FOURTH DEPARTMENT.

493. (Erie Co.) — Mtr. of Jeanne Steinhardt, as Executrix for James McKee, Jr., Appellant-Respondent, v. Johns Manville Corporation, et al., Respondents-Appellants, and Unarco Industries, Inc., Respondent. — Order modified and as modified affirmed without costs and complaint dismissed, in accordance with the following Memorandum: Decedent James McKee had been employed continuously working with a variety of asbestos products from 1944 until 1970. In 1970 he developed respiratory ailments and stopped working because of his deteriorating physical condition. In 1973 his condition was conclusively diagnosed as asbestosis/pulmonary fibrosis with a moderate degree of obstructive pulmonary emphysema, all of which relate to the asbestos which plaintiff had allegedly ingested over his years of employment. This action was commenced in 1975 and plaintiff served a complaint in which alleged causes of action for negligence, strict products liability and breach of warranty of fitness and merchantability. (In August, 1979 McKee died of mesothelioma — an asbestos related cancer and a substitute plaintiff continues the action.)

Plaintiff concedes that the cause of action for breach of warranty was properly dismissed as time barred, but argues that the negligence and strict products liability causes of action were timely, having been commenced within three years of the discovery of his condition.

Plaintiff's argument is without merit. "The injury occurs when there is a wrongful invasion of personal or property rights and then the cause of action accrues. . . . [T]he statutory period of limitations begins to run from the time when liability for loss has arisen even though the injured party may be ignorant of the existence of the wrong or injury." (Schmidt v. Merchants

Dispatch Trans. Co., 270 NY 287, 300; see, also, Reis v. Pfizer, Inc., 48 NY2d 664; Thornton v. Roosevelt Hosp., 47 NY2d 780; Schwartz v. Heyden Newport Chemical Corp., 12 NY2d 212.) Here, the injury to plaintiff occurred when he inhaled the allegedly harmful substances, which was no later than 1970. Thus, the negligence cause of action was properly dismissed. Similarly, the cause of action for strict products liability sounds in tort and the period of limitations is the same as the period for negligence (Victorson v. Bock Laundry Mach. Co., 37 NY2d 395). Accordingly, the cause of action for strict products liability should also be dismissed. All concur, Callahan, J. not participating. (Appeals from Order of Erie Supreme Court, Kuszynski, J. — Dismiss Causes of Action.) Present: Cardamone, J.P., Simons, Callahan, Doerr, Moule, JJ.

DECISION OF SPECIAL TERM, SUPREME COURT, COUNTY OF ERIE, STATE OF NEW YORK

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

JAMES McKEE, JR.,

Plaintiff,

—*vs*—

JOHNS MANVILLE CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; PHILIP CAREY INDUSTRIES, INC.; OWENS-CORNING FIBERGLASS CORPORATION; ARMSTRONG CORK COMPANY; FIBREBOARD PAPER PRODUCTS CORPORATION; COMBUSTION ENGINEERING, INC.; PITTSBURGH CORNING CORPORATION; UNARCO INDUSTRIES, INC.; ARMSTRONG CONTRACTING AND SUPPLY CORPORATION; STANDARD ASBESTOS MANUFACTURING & INSULATING CO.; KEENE INSULATION COMPANY; ROCKWELL MANUFACTURING CO., and RUBEROID COMPANY, DIVISION OF GAF CORPORATION,

Defendants.

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES (James W. Kirkpatrick, Esq., of Counsel) for Plaintiff,

HAGERTY & HAGERTY (James J. Hagerty, Esq. of Counsel) for Pittsburgh Corning Corp.

BROWN, MALONEY, GALLUP, ROACH & BUSTEED, P.C. (Daniel T. Roach, Esq. of Counsel) for Johns-Manville Corp.

SAPERSTON, DAY & RADLER, (Thomas F. Segalla, Esq., of Counsel) for Fibreboard Paper Products,

Decision of Special Term, Supreme Court, County of Erie, State of New York

ROBERT M. KIEBALA, ESQ., for Eagle-Picher Industries,

BROWN, KELLY, TURNER, HASSETT & LEACH (Gordon D. Tresch, Esq., of Counsel) for Owens-Corning Fiberglass,

HURWITZ & FINE, P.C. (John J. Quackenbush, Jr., Esq., of Counsel) for Armstrong Cork Company,

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR (John J. Cooney, Esq., of Counsel) for Armstrong Contracting and Supply Co.,

PHELPS, GRAY, MANSOUR & HEWITT (Benjamin Hewitt, Esq., of Counsel) for Combustion Engineering Inc.,

WEAVER, MAGHRAN & McCARTHY, (Irving C. Maghran, Esq., of Counsel) for Unarco Industries,

LANSDOWNE & GREENE (James W. Greene, Esq., of Counsel) for Standard Asbestos Manufacturing,

SMITH, MURPHY & SCHOEPPERLE (Frank G. Godson, Esq., of Counsel) for Kenne Insulation,

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER (Paul F. Jones, Esq., of Counsel) for Ruberoid Company.

NO APPEARANCE FOR PHILIP CAREY INDUSTRIES.

MEMORANDUM

KUSZYNSKI, J.

Plaintiff, JAMES McKEE, JR., who maintains he has developed the disease asbestosis as the result of his thirty years as an insulation employee, brings this action against 14

defendants who allegedly manufactured and marketed the asbestos products.

Defendants herein named, pursuant to CPLR 3211 (a) (5) move to dismiss the complaint and the cross-complaints of the co-defendants upon the ground the actions were not commenced within the time provided for in the Statute of Limitations, and also pursuant to CPLR 3212 for summary judgment.

Plaintiff's complaint contains three causes of action collectively against the defendants in negligence, strict products liability in tort and for breach of warranty. It sets forth that "by reason of exposure to and inhalation of asbestos particles and dust as well as other contaminants found in defendants' products and materials", the plaintiff contracted asbestosis and pulmonary fibrosis. (Par. 20, Complaint)

To date the defendants have had a deposition before trial of the plaintiff and of his treating physician, Dr. Howard Paul Longstreth, while plaintiff as yet, has not had any discovery proceedings. Therefore, defendant's Fibreboard Paper Products Corporation motion to dismiss because of plaintiff's failure during his oral deposition to specifically identify Fibreboard as a manufacturer of any asbestos containing product he may have handled, and defendant's Armstrong Cork Company similar motion in relation to its product called "Armaspray" and "L.T. Cork Covering" are premature. They are denied without prejudice to being renewed when plaintiff's discovery proceedings are concluded.

Most critical, however, to plaintiff's lawsuit is the issue of the Statute of Limitations.

Mr. McKee alleges in his complaint that he has been disabled since October 30, 1972 and his condition was first diagnosed as "asbestosis-pulmonary fibrosis", some time in the 2-week

period between March 29, 1973 and April 13, 1973. Defendants maintain that according to his medical records, the plaintiff may have suffered from this disease since 1968.

Plaintiff states he is unemployed since 1970, except for a period from August, 1972 to October 29, 1972, during which he worked for Frontier Insulation Co. (Bill of Particulars, ¶¶ 2 and 3) At the deposition before trial and at the Workmen's Compensation Board hearing concerning his compensation claim, Mr. McKee stated he did not know whether any asbestos was involved in the course of this employment. The superintendent at Frontier Insulation, Robert Wopperer, testified at the Compensation hearing, however, that the materials plaintiff worked with did not contain asbestos. Defendants set forth in the moving papers that "Thereafter when Frontier Insulation sought to be discharged, Mr. McKee's counsel conceded that plaintiff had not used any asbestos products and that the Referee subsequently discharged Frontier Insulation on the basis that plaintiff has not been exposed to asbestos during that employment."

While determinations of administrative boards are not necessarily binding on the courts of law, the doctrine of collateral estoppel prevents plaintiff from re-litigating the issue of whether he was exposed to asbestos during 1972 when he was employed at Frontier Insulation. See *Ogino v. Black*, 304 NY 872; *Doca v. Federal Stevedoring Co.*, 280 App Div 940, 116 NYS2d 25, affd 205 NY 648; *Schwartz v. Public Administrator*, 24 NY2d 65, 298 NYS2d 955. Especially so, since Mr. McKee in his answering papers had failed to preserve this question in any way as a triable issue.

Thus, for the Statute of Limitations purposes, Mr. McKee's last exposure to asbestos was during his employment in 1970 and argueably the diagnosis of his condition was not made until

March or April, 1973. The summonses were served upon the defendants in August, 1975.

Proceeding now to consider the causes of action alleged against the defendants:

> "A cause of action for strict products liability in 'independent' (*Micallef v. Miehle Co., Division of Miehle-Goss Dexter*, 39 NY2d 376, 382) of a cause of breach of warranty (or negligence) and the fact that one is barred does not preclude the other."

Murphy v. General Motors Corp., 55 AD2d 486, 391 NYS2d 24 (3rd Dept. 1977)

It is imperative that this Court consider the Statute of Limitations separately as to each cause of action in determining whether plaintiff's lawsuit is barred.

The first cause of action is framed in the traditional negligence setting and is controlled by the requisites as set forth in *Schmidt v. Merchants Dispatch Transportation Co., 270 NY 287 (1936). Here, for plaintiff to succeed, it is necessary for him to allege and show both diagnosis and exposure within the three (3) year period preceding the action. A direct challenge to Schmidt, supra* was rejected in *Schwartz v. Heyden Newport Chemical Corp.*, 12 NY2d 212, 237 NYS2d 714, cert den 374 US 808, 83 S.Ct.1697, (1963) when the Court stated:

> "The wrong is done, the right violated and the cause of action complete when the invasion takes place independently of any actual pecuniary damage."

Therefore, plaintiff McKee's action in negligence is barred by the Statute of Limitation, CPLR 214, because he was not *exposed* to asbestos while employed, during the period of three (3) years preceding the service of the summons upon the defendants.

Decision of Special Term, Supreme Court, County of Erie, State of New York

Mr. McKee's second cause of action is anchored on the theory of strict products liability established in this State by *Codling v. Paglia*, 32 NY2d 330, 345 NYS2d 461 (1973). Strict products liability is a separate and distinct cause of action from traditional negligence and as such, is not controlled by the Statute of Limitations established in *Schmidt, supra*. The period of limitation as to a claim grounded on this approach to liability was determined to "begin to run at the time of injury" and continues for a period of three (3) years. *Victorson v. Bock Laundry Machine Co.*, 37 NY2d 395, 373 NYS2d 39 (1975).

The enigmatic question then surfaces as to when did the "injury" occur. A review of the cases in the area reveals this question to be unanswered by the Courts of this State in its application to "occupational diseases" actions brought under the theory of strict products liability. Recent decisions in other jurisdictions have generally held that the issue of the Statute of Limitations in such cases is a proper factual matter for the jury or the trier of the facts to decide, and that the date of diagnosis should measure the date the Statute of Limitations begins to run, unless the defendants can show that the plaintiff should, in the exercise of reasonable diligence, have earlier discovered the nature of the disease. *Ricciuti v. Voltarc Tubes, Inc.* 277 F2d 908 (2nd Cir., 1960). See also *Karjala v. Johns-Manville Products Corp.*, 523 F2d 155 (1975); *Borel v. Fibreboard Paper Products, Corp.*, 493 F2d 1076 (1973).

In New York, it has been previously held that the question of determining the time of injury, for purposes of fixing the time the Statute of Limitations began to run, is a proper triable issue. *Orloff Towers Inc. v. Vermilya-Brown Co.*, 50 AD2d 740, 377 NYS2d 8 (1st Dept., 1975).

> "[T]here is rarely a magic moment, when one exposed to asbestos can be said to have contracted asbestosis; the

> exposure is more in the nature of a continuing tort. It is when the disease manifests itself in a way which supplies some evidence of causal relationship to the manufactured product that the public interest in limiting the time for asserting a claim attached and the statute of limitations will begin to run. The time at which Karjala's impairment manifested itself was, of course, for the jury to determine." *Karjala, supra* at 160, 161.

Furthermore, recent analagous New York State decisions on the application of "date of discovery rule" to medical malpractice actions are in accord with the rule that a Statute of Limitations begins to run from the time of discovery of the disease in occupational disease cases. See *Flanagan v. Mt. Eden General Hospital*, 24 NY2d 427, 301 NYS2d 23 (1969); *Smalls v. New York City Health & Hospital Corp.*, 55 AD2d 537, 389 NYS2d 372, (1st Dept., 1976); *Merced v. New York City Health and Hospital Corp.*, 56 AD2d 553, 391 NYS2d 863 (1st Dept., 1977).

It appears the incubation period for asbestosis ranges up to as long as 15 to 25 years. Therefore, measuring the injury from the date of a last exposure would effectively deny relief to many workers who were employed in the industry for a lesser period.

> "We think it unreasonable to hold that the statute of limitations begins to run against an injured person at a time when he does not in fact know and could not with the exercise of reasonable diligence know, what his injury is. To hold would nullify any right to recover for many serious but slowly and insidiously developing diseases."

Ricciuti v. Voltarc Tubes, Inc., supra.

See 63 Harv. L. Rev. 1177.

The deposition of plaintiff's physician, Dr. Howard Paul Longstreth, the negative biopsy performed upon plaintiff in

March, 1968 and the absence of any contradictory medical proof is sufficient to preserve the issue of the date of McKee's injury by asbestosis for trial. The time of the diagnosis marks the date the statute of limitations began to run, unless the defendants can show that the plaintiff should have, in the exercise of reasonable diligence discovered earlier the nature of the disease.

Plaintiff's third cause of action is grounded upon defendants' alleged breach of warranty of fitness and merchantability stemming from the contract of sale of the asbestos by the manufacturers to plaintiff's employers. It is controlled by a four (4) year Statute of Limitations commencing at the time of sale. *Uniform Commercial Code Section 2-275, See 62-1/2 McKinney's Section 2-275, NY Annotation.* This action is barred because defendants clearly could have only sold the asbestos products allegedly involved in plaintiff's injury to his employers prior to the termination of his employment in 1970, more than four (4) years before the service of the summonses.

This Court finds that plaintiff McKee's theories of recovery based upon negligence and breach of warranty are barred by the applicable Statutes of Limitations; plaintiff's theory of strict products liability, however, is viable because the question of when the injury occurred is a triable issue.

Leave is granted to defendants to preserve their objections concerning the Statute of Limitations as an affirmative defense. Their answers are due within twenty (20) days of the entry of the order herein.

Submit order accordingly.

DATED: Buffalo, New York
April 27, 1978.

/s/ JOSEPH P. KUSZYNSKI
Justice of the Supreme Court

JUDGMENT OF NEW YORK COURT OF APPEALS

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

4 No. 434

In the Matter of Jeanne Steinhardt, as Executrix for James McKee, Jr.,

Appellant,

v.

Johns-Manville Corporation, et al.,

Respondents.

The appellant in the above entitled appeal appeared by Lipsitz, Green, Fahringer, Roll, Schuller & James, Esqs.

the respondent(s) appeared by Saperston, Day & Radler, Esqs.; Phillips, Lytle, Hitchcock, Blaine & Huber, Esqs.; Brown, Maloney, Gallup, Roach & Busteed, Esqs.; Hodgson, Russ, Andrews, Woods & Goodyear, Esqs.; Phelps, Gray, Mansour & Hewitt, Esqs.; Hurwitz & Fine, Esqs.; Brown, Kelly, Turner, Hassett & Leach, Esqs.; Hagerty & Hagerty, Esqs.; Robert M. Kiebala, Esq.; Smith, Murphy & Schoepperle, Esqs.; Dale, Hawthorne, Markarian, Ginsburg & Siegel, Esqs.; Maghran, McCarthy & Flynn, Esqs.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, in a memorandum. All concur, Meyer, J., on constraint of *Thornton* v. *Roosevelt Hosp.* (47 N Y 2d 780); except Fuchsberg, J., who dissents and votes to reverse in an opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to

the Supreme Court, Erie County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW
Deputy Clerk of the Court

Court of Appeals, Clerk's Office, Albany, October 29, 1981

STATE OF NEW YORK, COUNTY OF ERIE, ss:

I, GENEVIEVE M. STAROSCIAK, Clerk of said County, and also Clerk of Supreme and County Courts of said County, do hereby certify that I have compared the annexed copy with the original Order filed in my office, and that the same is a correct transcript therefrom and of the whole of said original.

WITNESS my hand and seal of said County and Courts on December 9, 1981.

/s/ GENEVIEVE M. STAROSCIAK
County Clerk

(Seal)

AMENDMENT TO REMITTITUR BY NEW YORK COURT OF APPEALS

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of December A.D. 1981

PRESENT, Hon. Lawrence H. Cooke, *Chief Judge, presiding.*

4 Mo. No. 1221 (A)

In the Matter of Jeanne Steinhardt, as Executrix of James McKee, Jr.,

Appellant,

vs.

Johns-Manville Corporation, et al.,

Respondents.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the plaintiff Steinhardt, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the holding that the plaintiff's causes of action accrued and the statutes of limitations commenced when the employment-related exposure to asbestos particles occurred deprived plaintiff of due process of law.

AND the Supreme Court, County of Erie, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

STATE OF NEW YORK COURT OF APPEALS

In the Matter of JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR.,

Appellant

-vs-

JOHNS-MANVILLE CORPORATION, EAGLE PICHER INDUSTRIES, INC., PHILLIP CAREY INDUSTRIES, INC., OWENS-CORNING FIBERGLASS CORPORATION, ARMSTRONG CORK COMPANY, FIBREBOARD PAPER PRODUCTS CORPORATION, COMBUSTION ENGINEERING, INC., PITTSBURGH CORNING CORPORATION, STANDARD ASBESTOS MANUFACTURING AND INSULATING CO., KEENE INSULATION COMPANY, ROCKWELL MANUFACTURING CO., RUBEROID COMPANY, Division of GAF CORPORATION, and UNARCO INDUSTRIES, INC.,

Appellees

U. S. DOCKET NO.

ERIE COUNTY INDEX NO. E-20645

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

SIRS:

NOTICE IS HEREBY GIVEN that JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR., the appellant above named, hereby appeals to the Supreme Court of the

Notice of Appeal to United States Supreme Court

United States from the final judgment of the Court of Appeals for the State of New York entered in the office of the clerk of that court on October 29, 1981, affirming the dismissal of the complaint, and that order of the Court of Appeals for the State of New York having subsequently been entered in the office of the clerk of the Supreme Court, Erie County, on November 10, 1981, that court now being the office possessed of the record.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED: December 10, 1981

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
FRANK S. KEDZIELAWA, ESQ.,
CARL A. GREEN, ESQ.,
Of Counsel
Counsel for Appellant
One Niagara Square,
Buffalo, New York 14202
(716) 849-1333

ORDER EXTENDING APPELLANT'S TIME TO DOCKET APPEAL

SUPREME COURT OF THE UNITED STATES

No. A-569

JEANNE STEINHARDT, AS EXECUTRIX OF JAMES McKEE, JR.,

Appellant

v.

JOHNS-MANVILLE CORPORATION

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled case be, and the same is hereby, extended to and including February 26, 1982.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United States

Dated this 28th
day of December, 1981.

No. 81-1615

Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER L. STEVAS
CLERK

In The

Supreme Court of the United States

October Term, 1981

IN THE MATTER OF JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR.,

Appellant,

vs.

JOHNS-MANVILLE CORPORATION, et al.,

Appellees.

On Appeal from the
New York Court of Appeals

MOTION TO DISMISS

SAPERSTON, DAY, LUSTIG, GALLICK,
KIRSCHNER & GAGLIONE, P. C.
By: THOMAS F. SEGALLA, ESQ.
Attorney for Appellee
Fibreboard Paper Products, Inc.
Office and Post Office Address
1500 Liberty Bank Building
Buffalo, New York 14202
Telephone: (716) 856-5400

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QUESTIONS PRESENTED

1. Is the New York Court of Appeals judgment sustainable on an adequate independent state ground?

2. Does the New York Court of Appeals holding that appellant's causes of action accrued and the statutes of limitations commenced on the last date of employment-related exposure to asbestos deprive appellant of due process of law?

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In The

Supreme Court of the United States

October Term, 1981

No. 81-1615

IN THE MATTER OF JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR.,

Appellant,

vs.

JOHNS-MANVILLE CORPORATION, et al.,

Appellees.

On Appeal from the
New York Court of Appeals

MOTION TO DISMISS

Pursuant to Rule 16.1 (b) of the Rules of the Supreme Court of the United States, appellee Fibreboard Paper Products Corporation* moves to dismiss the appeal taken from a judgment of the State of New York Court of Appeals, on the grounds that the judgment is sustainable on an adequate independent non-federal basis and that the appeal does not present a substantial federal question.

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*Statement pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States:

Fibreboard Paper Products Corporation is a wholly owned subsidiary of Louisiana-Pacific Corporation. Fibreboard Paper Products Corporation has no subsidiaries.

STATEMENT OF THE CASE

In August, 1975 James McKee, Jr. commenced suit against fourteen major manufacturers, suppliers and distributors of asbestos-containing insulation materials alleging theories of negligence and strict products liability and seeking to recover for alleged asbestos related injuries. Mr. McKee, who had worked with asbestos insulation from 1939 to 1972, was last exposed to asbestos during employment in 1970, four and one-half years prior to commencement of this suit.

The New York Court of Appeals affirmed the dismissal of appellant's causes of action as barred by the three year statute of limitations applicable to actions to recover for personal injury contained in the New York Civil Practice Law and Rules §214(5), and declined appellant's invitation to change New York's accrual rule such that McKee's cause of action would accrue on the date of discovery of the asbestos disease rather than on the date of last exposure to the invading substance. The Court reiterated New York law that causes of action for personal injury accrue at the time of invasion of a claimant's body and noted that extension of New York's limited "date of discovery" provision, contained in the New York Civil Practice Law and Rules §214-a, and applicable to medical malpractice and foreign object cases, was a matter best reserved for the legislature. *Steinhardt v. Johns-Manville Corp., et al.*, 54 N.Y.2d 1008, 446 N.Y.S.2d 244, ____ N.E.2d ____ (1981). (Printed in appellant's Jurisdictional Statement at Appendix, A-1).

SUMMARY OF ARGUMENT

1. Even if appellant's causes of action for alleged asbestos related diseases were deemed to accrue upon date of discovery of the diseases, appellant's suit would be barred by New York's two year statute of limitations applicable to claims accruing upon discovery. The Judgment of the New York Court of Appeals thus rests on adequate independent non-federal grounds.

2. The longstanding New York rule that accrual occurs upon the date exposure is supported by a rational basis and does not present a substantial federal question.

ARGUMENT

POINT I

The judgment of the Court of Appeals rests on adequate independent state grounds and the appeal seeks an advisory opinion.

The New York Court of Appeals held that appellant's cause of action, commenced in August, 1975, accrued in 1970 on the date of appellant's last work related exposure to asbestos and was time barred by New York's three-year statute of limitations for suits alleging personal injuries. It is undisputed that Mr. McKee discovered his disease, at the latest, on April 3, 1973.

New York Civil Practice Law and Rules Section 203(f) provides, in pertinent part, that "where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered . . . the action must be commenced within two years after such actual or imputed discovery. . .". Accordingly, even if the Supreme Court were to require New York to apply a date of discovery rule to appellant's suit, CPLR 203(f) would be the applicable statute of limitations (*Erie Railway Co. v. Tompkins*, 304 U.S. 64 (1938); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945)), and would operate to bar his claims. That section sets forth the judgment of the New York Legislature concerning statutes of limitations applicable to claims deemed to accrue on the date of discovery and there can be no real question that such two year statute of limitations passes constitutional muster. *See Canadian No. Ry. Co. v. Eggen*, 252 U.S. 553, 562 (1920); *Wilson v. Iseminger*, 185 U.S. 55, 62 (1901); *Wheeler v. Jackson*, 137 U.S. 245, 255 (1890).

Should the judgment of the New York Court of Appeals with respect to accrual of appellant's suit be found constitutionally defective and a date of discovery rule deemed constitutionally

mandated, appellant's causes of action would be governed by CPLR §213(f) and would still be time-barred. The judgment of the Court of Appeals thus rests on adequate independent state grounds, and the Court is, in effect, being asked to render an advisory opinion having no practical effect on appellant's case. Inasmuch as a decision by this Court on the merits "cannot affect the rights of the litigants in the case before it," *St. Pierre v. United States*, 319 U.S. 41, 42 (1940), the appeal is for all practical purposes moot and the Court should refuse appellant's invitation to render an advisory opinion. *Herb v. Pitcarin*, 324 U.S. 117 (1945).

POINT II

The appeal does not present a substantial federal question.

The New York rule that accrual of negligence and strict products liability causes of action occurs at the time of injury is clear and longstanding. In *Schmidt v. Merchants Despatch Trans. Co.*, 270 N.Y. 287 (1936), the New York Court of Appeals held that a cause of action asserting a claim for lung damage allegedly caused by inhalation of dust while in the defendant's employ accrued when the plaintiff inhaled the foreign substance rather than when he discovered the disease. Similarly, in *Schwartz v. Heyden Newport Chemical Corp.*, 12 N.Y.2d 212, *remittitur amended* 12 N.Y.2d 1073, *cert. den.* 374 U.S. 808 (1963), the plaintiff alleged that a compound inserted into his sinuses during an x-ray procedure caused him to contract cancer many years later. The Court held that his claim accrued at the time of the invasion of plaintiff's body and not at the time of the manifestation of the cancer. Finally, in *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780 (1979) the New York Court of Appeals held that causes of action alleging damages for a cancer allegedly caused by a drug injected into the paintiff's body twenty years before accrued at the time of invasion of the

plaintiff's body. *See also Reis v. Pfizer, Inc.*, 48 N.Y.2d 664 (1979). As it did in the instant case, the Court of Appeals in *Thornton* expressly declined to extend judicially the New York discovery rule, embodied in CPLR 214-a and applicable to medical malpractice, and noted that "[s]uch matter is best reserved for the Legislature, and not the courts." *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 781-782, *supra*.

Matters relating to statutes of limitations have traditionally been left to the states and to the legislative process. *Jackson ex dem. Hart v. Lamphire*, 28 U.S. (3 Pet.) 280 (1830). They are "found and approved in all systems of enlightened jurisprudence," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). The Supreme Court has long recognized that it is within the sovereign power of each state to enact statutes of limitations, *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, (1831), and that "[t]hey have come into the law not through the judicial process but through legislation. They represent the public policy about the privilege to litigate." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). As early as 1830, in a case dealing with the validity of a state recording law, Justice Baldwin wrote:

> The time and manner of their operation, the exceptions to them, *and the acts from which the time limited shall begin to run*, will generally depend on the sound discretion of the legislature . . . (Emphasis supplied)

Jackson v. Lamphire, 28 U.S. (3 Pet.) 280, 290, *supra*. And as recently as 1979 this court has stated, with respect to statutes of limitations, "[w]e should give them effect in accordance with what we can ascertain the legislative intent to have been, [and if the legislative branch disagrees] it may exercise its prerogative to amend the statute so as to effect its legislative will." *United States v. Kubrick*, 444 U.S. 111, 125 (1979).

Where no fundamental right or suspect classification is involved, the requirements of due process are satisfied if the

legislation or interpretation bears a reasonable relation to a proper legislative purpose, *Nebbia v. New York*, 291 U.S. 502, 527 (1943), and if such reasonable relationship exists the courts will not inquire into the wisdom of the pronouncement *Dandridge v. Williams*, 397 U.S. 471 (1970). The right to bring suit is not a fundamental right guaranteed by the constitution, *San Antonio v. Rodriquez*, 411 U.S. 1 (1973), thus, access to the courts "may be denied if there is a rational basis therefore." *Montgomery v. Daniels*, 38 N.Y.2d 41, 60 (1975); *see also Ortwein v. Schwab*, 410 U.S. 656 (1973); *U.S. v. Kras*, 409 U.S. 434 (1973); *Clark v. Gulesian*, 429 F.2d 405 (1st Cir. 1970).

The New York accrual rule with respect to asbestos disease is based on sound and rational policy determinations. It is a recognition that the interests of an allegedly injured plaintiff are eventually outweighed by the interests in prohibiting stale claims whose defense is prejudiced by the loss of evidence, lack of records, death of witnesses and impaired accuracy of the fact-finding process. *See Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478 (1980); *United States v. Kubrick*, 444 U.S. 111, *supra.; Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965); *Order of Railway Telegraphers v. Railway Express Agency*, 321 U.S. 342, 249 (1944).

Finally, with respect to questions such as accrual of asbestosis related claims, the legislature, rather than the courts is in a better position to inquire into the causes and incidence of the alleged hardship and to balance the result of such inquiry against considerations of policy and the question of how society should best respond. *See Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 219, *remittitur amended* 12 N.Y.2d 1073, *cert. denied* 374 U.S. 808, *supra*.

Statutes of limitation "are by definition arbitrary, and their operation does not discriminate between the just and the unjust

claim, or the voidable and unavoidable delay." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). The Supreme Court has recently noted that "[i]t goes without saying that statutes of limitation often make it impossible to enforce what were otherwise perfectly valid claims." (*United States v. Kubrick*, 444 U.S. 111, 125, *supra*, and statutes of limitations have been held constitutionally valid which in some instances extinguish a right of action even before injury occurs, *Agus v. Future Chattanooga Development Corp.*, 358 F.Supp. 246 (E.D. Tenn. 1973); *Hargraves v. Brackett Stripping Machine Co.*, 317 F.Supp. 676 (E.D. Tenn. 1970). Other states such as Alabama and Virginia, follow the New York rule that the cause of action accrues at the time of exposure to or ingestion of the product. *Garrett v. Raytheon Co., Inc.*, 368 So.2d 516 (1979); *Street v. Consumers Mining Corp.*, 39 S.E.2d 271 (1946). In a related area, several states have by statute limited the time within which a products liability claim can be made. *See* Connecticut General Statutes Ann., Section 52-577(a); Florida Statutes Ann., Sections 95.031(2), 95.11(3); Utah Code Ann., Section 78-15-1 to 6.

Finally, appellant's repeated citation to *Urie v. Thompson*, 337 U.S. 163 (1949), as authority for broadranging constitutional requirements for statutes of limitations is erroneous. In *Urie* the Court was concerned solely with the federal statute of limitations applicable to the Federal Employers' Liability Act, *DeWitt v. United States*. 593 F.2d 276 (7th Cir. 1979), which was intended by Congress to be remedial legislation aimed at specific problems in the railroad industry. *Eggert v. Norfolk and W. Ry. Co.*, 538 F.2d 509, 511 (2nd Cir. 1976). In *Urie* the Court was concerned with discovering the intent of Congress in enacting specific legislation and was not concerned with constitutional issues. Indeed, *Urie* involved no constitutional questions at all, and its holding applies only to the Federal Employers' Liability Act.

Appellants' remaining reasons for asserting that the federal question is substantial concern the alleged number of people involved and the fact that authorities in New York as well as the national bench and bar have discussed the problems. All of these reasons, however, argue more strongly for a legislative, rather than a judicial resolution of the problem.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

SAPERSTON, DAY, LUSTIG, GALLICK,
KIRSCHNER & GAGLIONE, P. C.
By: THOMAS F. SEGALLA, ESQ.
Attorney for Appellee
Fibreboard Paper Products, Inc.
Office and Post Office Address
1500 Liberty Bank Building
Buffalo, New York 14202
Telephone: (716) 856-5400

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In the Matter of JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR.,
Appellant,

vs.

JOHNS MANVILLE CORPORATION, *et al.*,
Appellees.

ON APPEAL FROM THE STATE OF NEW YORK
COURT OF APPEALS

MOTION TO DISMISS

PAUL F. JONES
PHILLIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER
Attorneys for Appellee,
GAF Corporation
3400 Marine Midland Center
Buffalo, New York 14203
(716) 847-8400

ALEXANDER C. CORDES
Of Counsel

Dated: March 25, 1982

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

Questions Presented

1. Whether the judgment of the State of New York Court of Appeals is sustainable on an adequate independent non-federal basis where appellant's action would remain time-barred even if a "discovery rule" were superimposed on the New York statute of limitations applicable to the action?

2. Whether there is presented a substantial federal question in an appeal from a judgment of the State of New York Court of Appeals in which that Court declined to superimpose a "discovery rule" on the New York statute of limitations, but instead deferred to Legislature on that subject?

3. Whether, in an action for personal injury or disease allegedly caused by the inhalation of asbestos particles, an appeal to this Court lies from a judgment of the State of New York Court of Appeals affirming the dismissal of action on the ground that the action is barred by the statute of limitations, where it is argued on appeal that the appellant has been denied due process of law by the declination of the Court of Appeals to superimpose a "discovery rule" on the New York application statute of limitations?

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IN THE

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Appellees.

ON APPEAL FROM THE STATE OF NEW YORK
COURT OF APPEALS

MOTION TO DISMISS

Pursuant to Rule 16.1(a) and (b) of the Rules of the Supreme Court of the United States, the appellee GAF Corporation[1] moves to dismiss the appeal taken from a

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[1] Statement pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States:

GAF-Huls Chemie G.m.b.H is the only "affiliate" of appellee GAF Corporation. GAF has no parent company or subsidiaries other than wholly owned subsidiaries.

GAF Corporation is designated in the title as "Ruberoid Company, Division of GAF Corporation". On May 26, 1967, the Ruberoid Co. merged with GAF Corporation (R. 349).

judgment of the State of New York Court of Appeals, on the grounds that the judgment is sustainable on an adequate independent non-federal basis, that the appeal does not present a substantial federal question, and that the appeal is not within this Court's jurisdiction.

Statement of the Case

The complaint (R. 328-338)[2] in this action originally contained three alleged causes of action for personal injury and disease suffered by James McKee, Jr. allegedly as a result of inhalation of asbestos particles from asbestos-containing products and materials manufactured and marketed by the respondents during his thirty years of employment as an insulation worker. The three alleged causes of actions were based upon theories of negligence (first cause of action), strict products liability (second cause of action), and breach of implied warranty (third cause of action).[3] In their answers (R. 339-396) the appellees denied liability and raised various defenses, including the statute of limitations.

The record establishes—and appellant does not now dispute—that Mr. McKee was not exposed to any asbestos-containing material in 1971 or thereafter (R. 98, 272-280, 285, 473-477, 530-533, 537, 538-543, 582-586, 593, 594, 614-615, 637-638, 643.) Thus, Mr. McKee's last inhalation of asbestos particles occurred at least four and one-half years prior to commencement of this action in August, 1975.

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[2] All record references are to the record on appeal in the State of New York Court of Appeals.

[3] In the brief in the Supreme Court, State of New York, Appellate Division, Fourth Judicial Department, appellant conceded that the warranty claim was properly dismissed. Brief for Plaintiff-Appellant at viii, *Matter of Steinhardt v. Johns-Manville Corp.*, 78 A.D.2d 577 (4th Dept. 1980).

Viewing the record most favorably to the appellant, a positive clinical diagnosis of asbestosis was made not later than April 3, 1973, the date of Mr. McKee's discharge from Sisters of Charity Hospital (R. 173). This action was commenced in August, 1975, more than two years and four months after that diagnosis (R. 327).

In June, 1973, more than two years and two months prior to the commencement of this action, Mr. McKee filed his claim for Workers' Compensation that resulted in an award for the same injuries claimed in this action (R. 198).

Summary of Argument

1. Even if a "discovery rule" were superimposed on the New York statute of limitations applicable to this action, the action would remain time-barred. New York law provides that where the time for commencement of an action is computed from discovery of facts, the action must be commenced within two years of discovery. This action was commenced more than two years after such discovery. The judgment therefore should be viewed as being sustainable on an adequate independent non-federal basis, and the appeal should be dismissed.

2. The State of New York Court of Appeals properly deferred to the Legislature to determine whether a "discovery rule" should be superimposed on the New York statute of limitations. This did not result in a denial of due process of law to appellant's decedent. The New York rule is consistent with the traditional rationale behind statutes of limitations, and the rule did not deprive appellant's decedent of a reasonable or adequate time within which to bring suit. The appeal should be dismissed for lack of a substantial federal question.

3. Appellant does not challenge the constitutionality of the statute of limitations, but rather the refusal of the State of New York Court of Appeals to superimpose a "discovery rule" on that statute. The jurisdictional predicate asserted by appellant is lacking, and the appeal should be dismissed.

ARGUMENT

POINT I

The judgment of the State of New York Court of Appeals is sustainable on an adequate independent non-federal basis.

The State of New York Court of Appeals held in this case and in prior decisions that the cause of action accrued[4] at the time of invasion or inhalation and that the action was time-barred, under the applicable statute, three years later. Even if a "discovery rule" had been superimposed by the Court of Appeals, as urged by appellant, the action would still be time-barred. The New York Legislature has provided that where the time within which an action must be commenced is computed from actual or imputed discovery of facts "the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer." N.Y. Civ. Prac. Law §203(f). Under this provision the running of the statute of limitations in this case would have commenced not later than April 3, 1973, the date of the positive clinical diagnosis of Mr. McKee's asbestosis (R. 173),[5] and the time to commence suit would have expired two years later, on April 3, 1975. The action was commenced in August, 1975.

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[4] In the Court of Appeals, appellant noted that the appeal was "no request to invent a novel cause of action or accrual rule". Brief for Plaintiff-Appellant at 18, *Matter of Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008 (1981).

[5] Because Mr. McKee in June, 1973, filed his claim for Workers' Compensation that resulted in an award for the same injuries claimed in this action (R. 198), it is clear that Mr. McKee actually knew of the diagnosis more than two years before this action was commenced.

Thus it would have been time-barred even if a "discovery rule" applied. The superimposition by this Court of a "discovery rule" would not result in reversal of the judgment, and the judgment therefore should be viewed as being sustainable on an adequate independent non-federal basis, and the appeal should be dismissed.

In other words, appellant seeks to have this Court consider an issue which, even if decided in appellant's favor, would not alter the judgment affirming the dismissal of the action. Justice Jackson's comments in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945), bear directly on this consideration:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.

Because this Court's review of the judgment of the Court of Appeals could not result in a reversal of the judgment, appellant in effect requests this Court to render an advisory opinion not affecting the outcome of this case.

POINT II

This appeal does not present a substantial federal question.

Where suit is brought in New York State for lung injury or disease caused by the inhalation of dust, the applicable statute of limitations begins to run when the dust is inhaled, not when the plaintiff claims he became aware of the injury to his lungs. This rule was first enunciated by the State of New York Court of Appeals in *Schmidt v. Merchants Desp. Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936), and was reaffirmed in *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *remittitur amended* 12 N.Y.2d 1073, 190 N.E.2d 253, 239 N.Y.S.2d 896, *cert. denied* 374 U.S. 808 (1963), *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979), *Reis v. Pfizer, Inc.*, 48 N.Y.2d 664, 397 N.E.2d 390, 421 N.Y.S.2d 879 (1979), as well as in the instant case. Thus, as noted by a leading commentator even before the instant case was considered by the Court of Appeals, "[i]t is thus the settled New York rule that in personal injury cases, apart from malpractice, the cause of action accrues when the body is invaded, not when the injury is discovered." McLaughlin, New York Trial Practice—Statute of Limitations, NYLJ, January 11, 1980, p. 1, col. 1, at p. 2, col. 3.

Another leading commentator, also writing prior to the judgment appealed from, characterized the rule as follows:

> The rule continues to be that when an inhaled or injected substance eventuates in an injury, the moment of 'accrual' for the purpose of running the statute of limitations is the time of the initial inva-

> sion of the body and not the later time when the damage becomes manifest. *Thornton v. Roosevelt Hospital*, 47 N.Y.2d 780, 417 N.Y.S.2d 920 (May 10, 1979) (5-1 decision).
>
> The rule is traceable primarily to *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936), where the injury was caused by the inhalation of dust more than three years before suit was brought. * * * The later case of *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 237 N.Y.S.2d 714, cert. den. 374 U.S. 808, 83 S.Ct. 1697 (1963), adhered to that view, and the Court of Appeals now decides that if there is to be any overruling, it is "best reserved for the Legislature, and not the courts."

New York State Bar Association, New York State Law Digest at 3 (D. Siegel ed. October, 1979 [No. 239]).

In attacking this rule and attempting to make the argument appear to be substantial and of broad interest, appellant overstates the case in several respects. First, appellant asserts that "[t]here are thousands of asbestos insulation workers throughout New York State and not one of them has *ever* been able to timely file suit." Jurisdictional Statement at 8. There presently are pending numerous asbestos-related disease actions in the state and federal courts in New York State that have not been dismissed as time-barred, and if dismissal of those actions were sought, counsel for the various plaintiffs certainly would be expected to argue that those actions are not time-barred, even under the decision of the Court of Appeals in the instant case.

Second, appellant has cited cases from other jurisdictions that, unlike New York, have chosen to adopt a "discovery rule." Jurisdictional Statement at 9, n. 4.

Those decisions, of course, deal only with the statutes of limitations applicable in those various states. Not one of those decisions is premised upon the due process grounds urged here by appellant.

Third, the citation of *Urie v. Thompson*, 337 U.S. 163 (1949), is calculated to cloak appellant's argument for a "discovery rule" with an aura of constitutional mandate, even though that decision involved no question of constitutional law, but only the issue of when the statute of limitations contained in the Federal Employers' Liability Act begins to run.

The State of New York Court of Appeals has repeatedly stated that if there is to be a "discovery rule" in New York, that change should come from the Legislature rather than the Courts. For example, in *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 219, 188 N.E.2d 142, 237 N.Y.S.2d 714, *remittitur amended* 12 N.Y.2d 1073, 190 N.E.2d 253, 239 N.Y.S.2d 896, *cert. denied* 374 U.S. 808 (1963), *supra*, the Court of Appeals stated:

> It is not without reason that change in this area has been thought by us to be the responsibility of the Legislature. Our court has no facilities to inquire into the incidence of hardship cases under the statute, nor the peculiarly legislative prerogative to balance the result of such an inquiry against the countervailing considerations of prudence and social tranquility that are supposed to justify Statutes of Limitations. Moreover, how could we set limits to the right plaintiff would have us grant? Is it for a court to say that there shall be an outside limit of six years? If so, what of the fact that 15 years passed before plaintiff brought this action?

Again in 1979 the Court of Appeals declined to extend a "discovery rule" to strict products liability actions, stating that "[s]uch matter is best reserved for the Legislature, and not the courts." *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 781-782, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979), *supra*. Likewise, in the instant case, the Court of Appeals stated that it "believe[d] it to be inappropriate and injudicious to intrude into an area best suited for legislative scrutiny." Jurisdictional Statement at A-3. Each of these statements shows the Court of Appeals' concern that the Legislature, not the Court, determine whether there should be a rule based on the date of manifestation, date of discovery, date of medical diagnosis, or some other date, and that the Legislature consider the impact of such inevitably diverse circumstances as worker deferred medical examinations, different doctors giving different diagnoses, lung conditions not diagnosed specifically as being related to asbestos exposure, or a specific diagnosis of asbestos disease being made but only a general diagnosis of lung disease being communicated to the worker.

Appellant purports to raise two federal questions, neither of which is substantial or meritorious. Appellant's two due process arguments are that the refusal of the Court of Appeals to impose a "discovery rule" is "at odds with the very *raison d'etre* for statutes of limitations", and that "state statutes of limitation must provide the plaintiff with an adequate, *bona fide* opportunity to bring suit." Jurisdictional Statement at 9-10.

The New York rule is consistent with, rather than "at odds with", the traditional rationale behind statutes of limitations. The purpose of the statute of limitations was discussed by the Court of Appeals in *Schmidt, supra:*

> The Statute of Limitations is a statute of repose. At times, it may bar the assertion of a just claim. Then its application causes hardship. The Legislature has found that such occasional hardship is outweighed by the advantage of outlawing stale claims. * * * [A] cause of action sounding in negligence accrues at the time when through lack of care by an employer, deleterious substances enter the lungs of an employee though the development of consequential damages may be long delayed.

270 N.Y. at 302.

Likewise, in *Schwartz, supra*, the Court of Appeals again discussed the function of the statute of limitations in a similar context:

> Considering the function of a Statute of Limitations as a device for repose, a potential defendant's equities are the same whether the plaintiff knows of his condition or not. Repose is as beneficial to society in the one case as in the other. While the plaintiff's equities are greater in one case, it was presumably pursuant to a determination that the interests of an occasional claimant were subordinate to society's interest in repose that resulted in the Statute of Limitations in the first place. The existence of a discovery provision in the fraud statute bespeaks a legislative judgment that only in fraud cases, by their very nature, were there a sufficient number of unknown wrongs to justify a departure from the general rule. Apparently the rarity of such unfortunate cases in other types of actions did not outweigh the disadvantages of imposing a possible exception to the grant of repose to every person and industry who could be a potential defendant.

12 N.Y.2d at 218.

When previously given an opportunity to pass upon the constitutional issues appellant seeks to raise here,

this Court declined to do so and denied certiorari. *Schwartz v. Heyden Newport Chem. Corp.*, 374 U.S. 803 (1963), *supra.*[6]

This Court, in *United States v. Kubrick*, 444 U.S. 111, 125 (1979), recently commented as follows on the purpose and effect of statutes of limitations:

> It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable. We should give them effect in accord with what we can ascertain the legislative intent to have been.

The potential of injustice to a defendant "being put to his defense after memories have faded, witnesses have died or disappeared, and the evidence has been lost", *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), is at its greatest in the case of an occupational disease where there is no single product, let alone a single event, upon which to focus.

Nor did the New York rule deprive Mr. McKee of a reasonable or adequate time within which to bring suit. The application of the statute of limitations seems especially appropriate here—Mr. McKee had been an in-

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[6] In the petition for a writ of certiorari, it was asserted that the Due Process Clause was violated because "[t]here are no facts in the record showing that petitioner actually sustained bodily injury at or about the time of injection rather than subsequently thereto", because "[a]ny injury petitioner sustained at the time of injection was inherently unascertainable at that time", and because "[t]he case is decided on the pleadings alone, thus, in effect, denying petitioner a hearing on the issue of fact as to when he actually sustained bodily injury." Petition for a Writ of Certiorari at 2-3, *Schwartz v. Heyden Newport Chem. Corp.*, 374 U.S. 803 (1963).

sulation worker for more than thirty years (R. 333) and had been receiving regular medical attention for his lung disease since 1966 (R. 404-405).[7] His own attorney as long ago as 1967 characterized his disease as asbestosis (R. 286). Of course, it matters not how the appellant terms the ailment. (The complaint makes only a general reference to "asbestosis and/or pulmonary fibrosis, and other severe lung diseases" [R. 333].) Surely if the allegations as to causation are correct, that is, if his lung disease was caused by exposure to asbestos products, then that disease is the same disease for which he sought medical attention beginning in 1966.

The appeal should be dismissed for lack of a substantial federal question.

POINT III

No appeal to this Court lies from the judgment of the State of New York Court of Appeals.

Because the appellant has not "drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States", 28 U.S.C. §1257(2), the jurisdictional predicate asserted by appellant is lacking, and the appeal should be dismissed.

Although appellant's jurisdictional statements purports to attack the constitutionality of New York's statute of limitations applicable to this case, N.Y. Civ. Prac. Law §214(5), appellant's attack in reality is not against the statute itself, but against the refusal of the

[7] Indeed, by 1968 Mr. McKee's lung diseases had progressed so far that he was hospitalized and quit smoking cigarettes on the advice of his physician (R. 604-606).

State of New York Court of Appeals to superimpose on the statute a "discovery rule" by judicial fiat. As made clear in the argument to the Court of Appeals, appellant "questions the constitutionality ... of that result", Brief for Plaintiff-Appellant at 29, *Matter of Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008 (1981); appellant does not question the constitutionality of the statute itself. The Court of Appeals in its amendment to the remittitur stated that the question "presented and necessarily passed upon ... under the Constitution of the United States" was "[w]hether the holding that the plaintiff's causes of action accrued and the statutes of limitations commenced when the employment-related exposure to asbestos particles occurred deprived plaintiff of due process of law". Jurisdictional Statement at A-19. The amendment to the remittitur does not state that the question presented and passed upon by the Court of Appeals was whether the statute itself deprived appellant of due process of law. The statute is silent concerning the point at which the statutory time begins, except that it "shall be computed from the time the cause of action accrued". N.Y. Civ. Prac. Law §203(a). It is the Court of Appeals, not the statute, that dictates that the cause of action accrued at the time of exposure rather than discovery.

Because appellant does not challenge the statute as such, but instead the Court's refusal to superimpose a "discovery rule" on that statute, jurisdiction by appeal does not lie, and the appeal should be dismissed. *See Kulko v. California Superior Court*, 436 U.S. 84, 90 (1978); R. Stern and E. Gressman, Supreme Court Practice 164 (5th ed. 1978). Significantly, when these same arguments were made to this Court in 1962, it was by petition for a writ of certiorari, not appeal. *Schwartz v.*

Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *remittitur amended* 12 N.Y.2d 1073, 190 N.E.2d 253, 239 N.Y.S.2d 896, *cert. denied* 374 U.S. 808 (1963), *supra.*

If this Court elects to treat appellant's jurisdictional statement as a petition for a writ of certiorari, the petition should be denied for the reasons stated in Points I and II, *supra.*

Conclusion

For the foregoing reasons, the appeal should be dismissed.

Dated: March 25, 1982

Respectfully submitted,

PAUL F. JONES
PHILLIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER
Attorneys for Appellee,
GAF Corporation
3400 Marine Midland Center
Buffalo, New York 14203
(716) 847-8400

ALEXANDER C. CORDES
Of Counsel

The following appellees join in this motion to dismiss:

Eagle-Picher Industries, Inc.
ROBERT M. KIEBALA, ESQ.
150 Essjay Road
Williamsville, New York 14221

Owens-Corning Fiberglas Corporation
BROWN, KELLY, TURNER, HASSETT & LEACH
James W. Smyton, Esq., of Counsel
700 Niagara Frontier Building
Buffalo, New York 14202

Armstrong Cork Company
HURWITZ & FINE, P.C.
Sheldon Hurwitz, Esq., of Counsel
1410 Liberty Bank Building
Buffalo, New York 14202

Combustion Engineering, Inc.
PHELPS, GRAY, MANSOUR & HEWITT
Benjamin N. Hewitt, Esq., of Counsel
800 United Office Building
Niagara Falls, New York 14303

Pittsburgh Corning Corporation
MACLEAY, LYNCH, BERNHARD & GREGG
James C. Gregg, Esq., of Counsel
1625 K Street, N.W.
Washington, D.C. 20006

UNR Industries, Inc. (named herein as Unarco Industries, Inc.)
MAGHRAN, McCARTHY & FLYNN
Irving C. Maghran, Esq., of Counsel
1016 Ellicott Square Building
Buffalo, New York 14203

AC&S, Inc. (named herein as
Armstrong Contracting and
Supply Corporation)
HODGSON, RUSS, ANDREWS, WOODS
& GOODYEAR
William H. Gardner, Esq., of Counsel
1800 One M & T Plaza
Buffalo, New York 14203

Standard Asbestos Manufacturing
and Insulation Co.
JOHN MARKARIAN, ESQ.
3080 Delaware Avenue
Kenmore, New York 14217

Keene Insulation Company, by
SMITH, MURPHY & SCHOEPPERLE
Frank G. Godson, Esq., of Counsel
786 Ellicott Square Building
Buffalo, New York 14203

GGGbr

Rule 28.1 Statement

EAGLE-PICHER INDUSTRIES, INC.:
Subsidiary: Diehl & Eagle-Picher, G.m.b.H.

OWENS-CORNING FIBERGLAS CORPORATION:
Subsidiary: Owens-Corning Fiberglas Espana, S.A.

Affiliates:
Asahi Fiber Glas Company, Ltd.
Amiantit Fiberglass Industries Ltd.
Bayer Owens-Corning Glasswool
Eurostar, S.A.
Veroc Technology A/S
Scandinavia Glasfiber Aktiebolag
Fiberglas Canada, Inc.
Vitro-Fibras, S.A.
Fiberglas Colombia, S.A.
Polyarm, S.A.
Polyplaster, S.A.

ARMSTRONG CORK COMPANY:
Parent: Armstrong World Industries, Inc.

COMBUSTION ENGINEERING, INC.:
Combustion Engineering, Inc., a publicly owned corporation, and its wholly owned subsidiaries, own 20% or greater stock interest in the following domestic corporations:
CE/MHI Fan Company
Spire Corp.
CE/Studsvick, Inc.
MCES
Combustion Engineering/Neyrpric Hydropower, Inc.
Texas Tempered Glass Co.

The Tyler Wayne Research Corp.
Liberty-Reed
Delhi Foundry Sand Co.
Unimin
Pryor Giggey Company
Buffalo China Clay Co.
D.R. Robertson Pylinter, Inc.
Seaton Engineering Co., Inc.
Tomahawk Power and Pulp Co.
Benton Clay Co.
Basic Ballistics Company
CE/KSB Pump Co., Inc.

PITTSBURGH CORNING CORPORATION:
No listing required.

UNR INDUSTRIES, INC. (named herein as Unarco Industries, Inc.):
No listing required:

AC&S, INC. (named herein as Armstrong Contracting and Supply Corporation):
Statement previously filed.

STANDARD ASBESTOS MANUFACTURING AND INSULATION CO.:
No listing required.

KEENE CORPORATION (named herein as Keene Insulation Co.):
Parent: Bairnco Corporation
Subsidiary: Keene International Sales Corporation
This listing excludes foreign subsidiaries and affiliates that do not do business in the United States.

81-1615

Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER L. STEVAS
CLERK

No. A-569

IN THE

Supreme Court of the United States

October Term, 1981

IN THE MATTER

OF

JEANNE STEINHARDT, as Executrix of JAMES McKEE, Jr.,

Plaintiff-Appellant,

v.

JOHNS-MANVILLE CORPORATION, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS

LAWRENCE T. D'ALOISE, Jr.
CLARK, GAGLIARDI & MILLER, P.C.
Attorneys for Appellee Johns-Manville Corp.
99 Court Street
White Plains, NY 10601
(914) 946-8900

Questions Presented.

Is a substantial federal question presented by the assertion that the constitutional rights of appellants and other members of their class are violated by the application of the New York statute of limitations which accrues upon the date of injury/exposure?

Does the New York Court's determination that the statute of limitations runs from the date of the injury which occurs at the time of exposure violate plaintiff's constitutional rights?

Is a discovery rule constitutionally required whenever a person suffers an injury which is not discovered until a later time?

List of Parties.

In the New York Court of Appeals, the parties involved were: Jeanne Steinhardt, as Executrix of James McKee, Jr., plaintiff, and Johns-Manville Corporation, Eagle Picher Industries, Inc., Owens-Corning Fiberglas Corporation, Armstrong Cork Company, Fibreboard Paper Products Corporation, Combustion Engineering, Inc., Pittsburgh Corning Corporation, Unarco Industries, Inc., Armstrong Contracting & Supply Corporation, Standard Asbestos Manufacturing and Insulating Co., Keene Insulation Company, Ruberoid Company, Division of GAF Corporation, Philip Carey Industries, Inc., and Rockwell Manufacturing Co., defendants.

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No. A-569

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

IN THE MATTER

of

JEANNE STEINHARDT, as Executrix of James McKee, Jr.,

Plaintiff-Appellant,

v.

JOHNS-MANVILLE CORPORATION, *et al.,*

Defendants-Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS.

MOTION TO DISMISS.

Jurisdiction.

Appellant purports to invoke jurisdiction pursuant to 28 USC 1257 (2) on the grounds that the constitutional validity of the New York Statute of Limitations is drawn in

question by virtue of a decision of the New York Court of Appeals which determined that the statute of limitations barred plaintiff's claims herein.

Is is respectfully submitted that jurisdiction should properly be denied.

Statement of the Case.

This action was instituted in August, 1975, against numerous defendant manufacturers and suppliers of asbestos products. The claim is that Mr. McKee suffered injury and ultimately death from asbestos disease as a result of his 30 years of employment as an asbestos insulation worker. According to the Jurisdictional Statement, his last exposure to asbestos was in 1970. In April, 1973 he was diagnosed as having asbestos disease.

The plaintiff appeals from an order of the New York Court of Appeals which dismissed her complaint as barred by the statute of limitations. It is her contention that the statute of limitations should be measured from the time of discovery of the injury on the grounds that the present judicial construction has deprived her and those similarly situated of their constitutional rights.

POINT I.

Jurisdiction should be declined for want of a substantial federal question.

In order for appellant to be entitled to appeal to this Court, she must show that a substantial federal question is presented. In the words of Mr. Justice Brandeis: "[A]lthough the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not

. . . substantial in character." *Zucht v. King,* 260 US 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922). No such substantial question has been presented on the instant appeal.

The inherent nature of statutes of limitations as emphasized by this Court's approach to their application and analysis of their function leaves no doubt that they operate, where necessary, to extinguish procedural remedies, not substantive rights.

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. (Citation omitted). They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. *Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual.* (Emphasis supplied).

Chase Securities Corp. v. Donaldson, 325 US 304, 315 (1944).

This approach to statutes of limitations has been adopted by the Supreme Court as a "working hypothesis" and as a matter of constitutional law. (*Id.* at 314).

The abstract logic of the distinction between substantive rights and remedial or procedural rights, although at times

difficult to apply, has been found to be a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value. (*Chase, supra* at 314). Clearly, this case involves the latter situation, as there is no need for nationwide uniformity in the area of state statutes of limitations, nor is uniformity desirable since each state must determine its own policy about the privilege to litigate. (See generally *Board of Regents of the University of the State of New York v. Tomanio,* 446 US 478, 100 S.Ct. 1790, 64 L.Ed. 2d 440 [1980]).

Thus no question of a substantial character has been presented in the instant appeal. Appellants contend that the application of the New York statute of limitations has deprived them and other members of their class of their constitutional rights. At the very most, such rights are procedural in character and do not qualify as substantive in any sense. This Court has consistently maintained both the wisdom and the necessity of this distinction.

The case of *Urie v. Thompson,* 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 [1948], upon which plaintiff so heavily relies is not dispositive of the instant appeal. *Urie* involved the construction of a statute of limitations under the Federal Employer's Liability Act. Just as the federal judicial system is empowered to interpret and apply federal statutes, so are the states empowered to interpret and apply the statutes promulgated by their respective legislatures.

In the past this Court has refused to review the application of New York statute of limitations in a similar case. *Schwartz v. Heyden Newport Chemical Corp.,* 12 NY2d 212, remittitur amended 12 NY2d 1073, cert. den. 374 US 808, 83 S.Ct. 1697, 10 L.Ed. 2d 1032 involved questions of law virtually indistinguishable from those presented on the instant appeal.

In *Schwartz,* a product called "Umbrathor," manufactured by the defendant, was inserted into plaintiff's sinuses for the purpose of making them perceptible in X-rays. Some of the substance allegedly remained in plaintiff's head and 13 years later produced a carcinoma requiring the removal of an eye. The action was commenced two years after the surgery and 15 years after the injection of the umbrathor.

The New York Court of Appeals held that the injury occurred at the time of exposure and that the statute of limitations barred plaintiff's claim. It expressly refused to adopt a discovery rule. *Id.* at 216.

As here, the Court of Appeals in *Schwartz* amended its remittitur to expressly state that a constitutional issue had been considered (12 NY2d 1073). Nonetheless, this Court denied the *Schwartz* plaintiff's petition for writ of certiorari (374 US 808, 83 S.Ct. 1697, 10 L.Ed. 2d 1032). Implicit was that there was no question meriting review by this Court. The same is as true today as it was at the time of *Schwartz.*

In addition, we note that access to a court is not, in and of itself, an independent constitutional right. (*Ortwein v. Schwab,* 410 US 656, 93 S.Ct. 1172, 35 L.Ed. 2d 572 [1973]; see also *United States v. Kras,* 409 US 434, 93 S.Ct. 631, 34 L.Ed. 2d 626 [1973]). Thus, the fact that plaintiff has been denied her day in court on the merits by virtue of the application of the New York statute of limitations does not constitute a violation of a fundamental right.

Finally, the issue raised here is whether the application of the statute of limitations violated plaintiff's constitutional rights. Since plaintiff does not challenge the statute itself but rather its application, she has no appeal as of

right (*Zucht v. King*, 260 US 174, 43 S.Ct. 24, 67 L.Ed. 194 [1922]). Indeed the *Schwartz* plaintiff realized that proper access to this Court under these circumstances was by certiorari, not direct appeal.

POINT II.

The adoption of a date of discovery rule in all state statutes of limitations is not required by the federal constitution.

It is fundamental that the determination of a time within which to sue is always a legislative prerogative (*Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 [1944]). Furthermore, the right to prescribe within what time and upon what conditions suits can be commenced and maintained is fully within the power of the state (*Wood v. Cheesborough*, 228 US 672, 33 S.Ct. 706, 57 L.Ed. 1018 [1913]). The time within which to bring an action is a matter of legislative grace and is subject to legislative control (see generally *Chase, supra* at 325 US 314).

In New York, CPLR §214 provides:

> "The following actions must be commenced within three years:
>
> * * *
>
> 5. An action to recover damages for a personal injury."

The courts of New York have construed this statute to mean that the claim dismissed on the instant appeal accrued at the time of the invasion of the body, the time when the injury actually occurred. In this case it is claimed that decedent was exposed to asbestos for 30 years. His last exposure was some 5 years before this action was

brought. New York's approach represents a sound policy decision founded upon a careful balancing of all the competing considerations. The myriad and obvious difficulties in defending such product liability actions involving exposures consummated in the dim and distant past require no elaboration. Indeed, this Court recently articulated once again its philosophy regarding the purpose and function of statutes of limitations when it said that they

> "are made for the repose of society and the protection of those who may during the limitation have lost their means of defense." *United States v. Marion,* 404 US 307, 92 S.Ct. 455, 30 L.Ed. 2d 468 [1971].

Simply put, there comes a time when the manufacturer may legitimately expect peace of mind, and when "it is unfair to require the defendant to piece together his defense to an old claim." (*Walker v. Armco Steel Corp.*, 446 US 740, 100 S.Ct. 1978, 64 L.Ed.2d 659 [1980]).

There is nothing unique about the New York statute of limitations. The time within which to bring a tort claim for personal injury almost universally accrues at the time of the injury. The injuries to plaintiff's decedent occurred at the time of exposure. (*Thornton v. Roosevelt Hospital,* 391 NE2d 1002 [NY 1979]; Selikoff, Bader, *et al., Editorial: Asbestos and Neoplasin,* Amer. J. Medicine, 42:487-496 [1967]) The fact that a person may not know of his injury until some later time does not alter when the injury occurs, and when the statutory time begins to run.

Some states have established a discovery rule in latent disease cases.[1] The fact that the New York Court has

[1]Even if a discovery rule was applied, this claim would still be barred. New York requires that when the time to commence an action begins to run from discovery, the action must be instituted within two years. (CPLR 203[f]). This action was not brought until two years and four months after decedent was diagnosed as having an asbestos-related disease.

chosen to leave any change to the legislature is a policy decision about the privilege to litigate in that state. There is no constitutional deprivation merely because the Court chose not to invoke a discovery rule. The decision is purely a matter of state concern.

If plaintiff's contentions are true, a discovery rule is constitutionally required any time a person suffers injury not discovered until a later time.

In sum, there is no federal question involved. What is involved is the right of the New York Court to determine that it will not invoke a discovery rule in latent disease cases.

CONCLUSION.

Plaintiffs' appeal should be dismissed.

Respectfully submitted,

CLARK, GAGLIARDI & MILLER, P.C.
Attorneys for Appellees
Johns-Manville Corp.
The Inns of Court
99 Court Street
White Plains, NY 10601
(914) 946-8900

Of Counsel:
LAWRENCE T. D'ALOISE, JR.

No. 81-1615

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1981

IN THE MATTER OF JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR.,

Appellant,

vs.

JOHNS-MANVILLE CORPORATION, et al.,

Appellees.

On Appeal from the
New York Court of Appeals

APPELLANT'S REPLY BRIEF

Lipsitz, Green, Fahringer,
Roll, Schuller & James
Frank S. Kedzielawa, Esq.
Of Counsel
Attorneys for Appellant
Office and Post Office Address
One Niagara Square
Buffalo, New York 14202
Telephone: (716) 849-1333

DATED: Buffalo, New York
April 1, 1982

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In The

Supreme Court of the United States

October Term, 1981

No. 81-1615

IN THE MATTER OF JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR.,

Appellant,

vs.

JOHNS-MANVILLE CORPORATION, et al.,

Appellees.

On Appeal from the
New York Court of Appeals

APPELLANT'S REPLY BRIEF

THE COURT BELOW EXPRESSLY NOTED THAT ITS DECISION DID NOT REST UPON ANY INDEPENDENT, ADEQUATE STATE GROUND.

The purpose of the rule first announced in *Murdock* v. *City of Memphis*, 20 Wall. 590, 22 L.Ed 429 (U.S. 1875), is, "to refrain from reaching advisory opinions or passing upon moot questions." *Fay* v. *Noia*, 372 U.S. 391. 429-30 (1963). The New York Court of Appeals would not have amended its remititur to expressly note that the constitutional issues were "necessarily passed upon"[1] if, in its opinion, the dispute could have been

[1] See Appellant's Jurisdictional Statement at A-19.

determined without adjudication of the constitutional question. This is a rule well established in New York. *People ex. rel. Henderson* v. *Supervisors*, 147 N.Y. 1, 15-16 (1895); *People ex. rel. Gugenheim* v. *Mucci*, 32 N.Y.2d 307, 311-12 (1973). Thus in the view of the court below there was never any independent, adequate state grounds upon which it could rest its decision and consequently avoid any constitutional involvement.

Furthermore, appellant did not argue in the courts below for a discovery rule as appellees erroneously contend in their motions to dismiss. Appellant urged in her brief[2] filed below that as a date of injury state New York is in constitutional error in its difference from other date of injury states who have interpreted their accrual rule in satisfaction of their due process obligations. *See, e.g., Locke* v. *Johns-Manville Corporation*, 275 S.E.2d 900 (Va.Sup.Ct. 1981); *Karjala* v. *Johns-Manville Corporation*, 523 F.2d 155, 159-61 (8th Cir. 1975) (applying Minnesota Law).

None of the courts below made any determination whether this action could be barred by New York CPLR 203(f). The sole basis for barring these claims employed by the courts below was CPLR 214(5). *See* Jurisdictional Statement at A-2 to A-16.

Adjudication of the federal question presented by the Jurisdictional Statement was an unavoidable aspect to the New York Court of Appeals' decision. Merely reaffirming that the date of injury equates with the date of exposure or inhalation to the harmful substance does not finally determine appellant's claim, *i.e.*, that such an interpretation of §214(5) conflicts with United States Supreme Court precedent. The court below could not rest its decision solely upon its historical definition of the "date of injury", but instead had to adjudicate appellant's claim that this definition was at odds with the federal constitution.

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[2]See excerpts from Appellant's reply brief filed below appended *infra*.

Thus the court below noted that, "there was . . . necessarily[3] passed upon a question under the Constitution of the United States . . . ." (Jurisdictional Statement at A.-19). Therefore, there was no "independent" State grounds for the decision appealed from.

> Of course, it is not open to us to revise the construction placed upon the statute by the State court, but it is open to us to determine whether the application made of the statute in this instance was so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to perserve. *Sw. Teleg. and Telegph. Co.* v. *Danaher*, 238 U.S. 482, 489 (1914).

And again in *Enterprise Irrigation District* v. *Farmers' Mutual Canal Company*, 243 U.S. 157, 164 (1916), this Court stated:

> [W]here the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain (citation omitted).

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[3] "But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is *necessary* to any final judgment in the case, or that there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the Federal question, then this court will reverse the judgment of the State court, and will either render such judgment here as the State court should have rendered, or remand the case to that court, as the circumstances of the case may require." *Murdock* v. *City of Memphis*, 20 Wall. at 363, 22 L.Ed. at 444 (emphasis supplied).

The motions to dismiss should be denied.

Respectfully submitted,

Lipsitz, Green, Fahringer,
Roll, Schuller & James
Frank S. Kedzielawa, Esq.
Of Counsel
Attorneys for Appellant
Office and Post Office Address
One Niagara Square
Buffalo, New York 14202
Telephone: (716) 849-1333

DATED: Buffalo, New York
April 1, 1982

EXCERPTS FROM APPELLANT'S REPLY BRIEF BEFORE THE NEW YORK COURT OF APPEALS (pp. 4-6, 9)

* * *

[4]

POINT II

The defendants' briefs avoid the real issues in this appeal — if the plaintiff's "injury" is a disease when does it "occur" for statute of limitations purposes, and did *Schmidt* v. *Merchants' Despatch Transp. Co.* misapply the common law principles of accrual for negligence actions. Their briefs lack an independent, substantive analysis of these issues.

The governing rules for statutes of repose existed long before *Schmidt* was determined. Appellant's brief seriously questions whether *Schmidt* is consistent with those rules. *See* Appellant's Brief, pp. 15-19. The defendants give no adequate reply, but only point to what is at issue - - *Schmidt.*

[5]

Like the shell man at the carnival, their aim is to direct the viewer's eye toward the empty shell — rejection of a "discovery rule." The brief filed by Johns-Manville Corporation, in particular, seeks escape from the principal task required of this court which is not the adoption of a discovery rule, but the reexamination of *Schmidt* v. *Merchants Despatch Transportation Co.;* whether it is, indeed, consistent with traditional common law rules of accrual for negligence actions and whether its factual assumptions have a basis in reality. Appellant's brief makes this quite clear at the outset. *See* Appellant's Brief at p. 5-6.

Consequently, plaintiff's action is not governed by any discovery statute of limitations [*e.g.*, CPLR 203(f)], but by

Excerpts from Appellant's Reply Brief before the New York Court of Appeals

CPLR 214(5). Neither the Appellate Division, nor Special Term, nor the other defendants thought it proper to measure the timeliness of this action by any period of limitations other than CPLR 214(5). There is no question but that this action is timely brought under Section 214(5).

Johns-Manville seeks victory, then, not by responding to appellant's analysis of *Schmidt*, but in an exercise of litigious sophistry undertakes the destruction of a self-raised, "straw man" argument against an all-embracing discovery rule for products liability litigation. Where is its response, however, to appellant's claim that *Schmidt* applies the wrong accrual rule for negligence actions in effect using the time of the wrongful act and not the date of injury? Where is its answer that *Schmidt's* precedential cornerstone (*Conklin* v. *Draper*) has been overruled? Where is its attempt to explain the erosion of *Schmidt's* precedential support outside this state? *See* Appellant's Brief at p. 16-17; indeed, after appellant filed her brief the intermediate appellate court's decision was upheld in *Nolan* v. *Johns-Manville*, 74 Ill. App.3d 778, 392 N.E.2d 1352, *aff'd.* 49 Law Week 2568 (2/21/81) (Ill.Sup.Ct.). The Supreme Court of Virginia has also examined and redefined its application to asbestos diseases of the date of injury concept, as appellant herein urges, without resort to an expansive discovery rule. *See*

Locke v. *Johns-Manville Corp.*, 275 S.E.2d 900 (Va.Sup.Ct. 1981). Johns-Manville Corporation simply remains silent when appellant claims that *Schmidt* did not correctly apply the date of injury rule. Revealingly, it choses to argue about something else.

The defendants argue, in an inconsistent fashion, that the citation of cases from other jurisdictions is not persuasive

(Defendants' Brief pp. 13-14); yet judicial decisions from other jurisdictions was a cornerstone of *Schmidt* (270 N.Y. at 302). If developing case law was once a legitimate consideration in *Schmidt's* development, it is an equally persuasive consideration in its demise.

They fail to explain, understandably enough, *how Schmidt* can provide any litigant with an adequate, *bona fide* opportunity to sue and do not distinguish the *reasoning* of the United States Supreme Court in *Urie* v. *Thompson*, 337 U.S. 163, 69 S.Ct. 1018, which embraced the statute of limitations rule advanced by this plaintiff (*See* Appellant's Brief pp. 37-39). The defendants do not explain *why* the *Schmidt* holding escapes the high Court's condemnation as "delusive" and inconsistent "with the traditional purposes of Statutes of Limitation . . . ." *Id.*, at 170, 69 S.Ct. at 1025.

In reply to appellant's due process attack on *Schmidt*, Johns-Manville again plays the shell man's game. It portrays her as an advocate of an issue which in fact she does not advance (establishment of an independent, constitutional right of access to the courts which is being denied her in violation of the equal protection clause). *See* Johns-Manville's Brief at p. 11-12. Appellant's due process claim is thus deftly removed from the proper precedential context* and placed in the two-tier, equal protection framework of *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

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*See Appellant's Brief at p.31-32 discussing *Jackson* v. *Lamphire, et al* and *Gilbert* v. *Ackerman, et al.*

Excerpts from Appellant's Reply Brief before the New York Court of Appeals

[9]

* * *

Johns-Manville expresses concern about the "cost" of products liability insurance premiums, but nowhere mentions the cost in human life, the pain and suffering, or the financial losses which these out of state defendants have cast upon the citizens of New York and the fisc of our statutory benefit programs which can never be reimbursed from third party recoveries if the Johns-Manville Corporation has its way. Johns-Manville and its fellow defendants would dearly love to go their way undisturbed and leave to the good people of this state, and their employers, the costly chore of cleaning up the refuse of destroyed and impaired human lives which they foresaw, yet nevertheless produced, so that they might do business in New York State. Thus far that bill has been paid only by New York employers and employees.

The defendants' position is very simple — blind adherence to a judicial aberration that was wrongly decided forty-five years ago and still is unable to justify its holding to the very principles it professed to espouse; nor can it dissuade contemporary judicial opinion being developed by our sister states. These defendants boldly refuse recognition to the legitimate limitations of *stare decisis* and urge retention of a *judicial* rule that cannot justify itself to reason. *But see* Appellant's Brief at pp. 46-49.

Having read the defendants' arguments, plaintiff's position remains unchanged. We are convinced that *Schmidt* was wrong when it was first decided. Time has not altered its character. It is an outright denial of due process for the law to charge people with knowing what is inherently unknowable. *See* 63 *Harv.L.Rev.* at 1200, 1203-1207.

The defendants refuse to be drawn into this debate preferring, instead, to reargue the merits of a discovery rule. That, however, is not the issue. We do not call for a discovery rule as did the plaintiff in *Thornton*, but for the application of traditional statute of limitations rules even if the resulting injury